No. 11861

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

J. D. GREGG,

Appellant,

vs.

HENRY WALLACE WINCHESTER, ERNEST JOSEPH STEWART, *et al.*,

Appellees.

APPELLANT'S OPENING BRIEF.

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

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Statement Re: Jurisdiction of Court.

1. Appellees contend that the District Court has jurisdiction of the subject matter of this action because of the Fourteenth Amendment to the United States Constitution. This is denied by the Appellant.

2. The Circuit Court of Appeals has jurisdiction upon appeal to review the order in question by virtue of Judicial Code, Sec. 129 (28 U. S. C. A. 227).

3. The only allegations in Appellees' complaint which purport ot confer jurisdiction on the District Court are the conclusions of law pleaded in Paragraphs I, XXV, XXXVI and XXXVII of the complaint. [Tr. Vol. I, pp. 3, 53, 54.]

Statement of the Case.

Appellant is the owner of approximately 115 acres of land located near Roscoe in the San Fernando Valley within the boundaries of the City of Los Angeles, having substantial value only for the excavation and production of rock, sand and gravel. [Tr. Vol. I, p. 301.] This is the property which is the subject matter of the within action. [Tr. Vol. I, p. 4.] Since the year 1934 Appellant had been operating a gravel pit and processing plant on adjoining property owned by him, on which the deposit of available materials is about exhausted. [Tr. Vol. I, pp. 274, 284, 285.]

On June 2, 1946, pursuant to the provisions of Sec. 12.24 of the Los Angeles Municipal Code, Ordinance 90,500, Appellant filed an application with the City Planning Commission of the City of Los Angeles requesting a Conditional Use Permit authorizing him to use the property owned by him for the purpose of developing a natural resource, to-wit, to mine rock, sand and gravel. [Tr. Vol. I, p. 278.] The provisions of said Sec. 12.24 are set forth in Tr. Vol. I, p. 162.

Thereafter and pursuant to the procedure prescribed by Sec. 12.32C of said Municipal Code [Tr. Vol. I, p. 190] a public hearing was had before the City Planning Commission. [Tr. Vol. I, pp. 278, 279, 280.] After the hearing the Commisison denied the application. [Tr. Vol. I, p. 280.] Thereupon Appellant appealed to the City Council from the Commission's order denying his application [Tr. Vol. I, pp. 280, 281] pursuant to Section 12.24C and Sec. 12.32E of said Municipal Code. [Tr. Vol. I, pp. 164, 165, 192.]

Upon appeal the City Council referred the matter to its Planning Committee pursuant to Sec. 12.32E of said

Code, which Committee held a public hearing attended by about 250 persons, after which the Committee recommended that the Appellant's application be granted. [Tr. Vol. I, p. 281.] Thereafter on October 2, 1946, another public hearing was had before the City Council as a whole which was attended by a large number of persons and both proponents and opponents were given full opportunity to be heard. At the conclusion of the hearing the City Council adopted the report of its Planning Committee and granted Appellant the Conditional Use Permit allowing him to excavate for rock, sand and gravel from the subject property upon certain prescribed conditions. [Tr. Vol. I, pp. 281, 282, 283, 284.]

Thereupon, and pursuant to said Permit, Appellant commenced operations for the excavation and removal of rock, sand and gravel. [Tr. Vol. I, p. 285.]

On November 22, 1946, twenty-six persons, alleged to be owners of property in the vicinity of the permit area, filed an action in the Superior Court of the State of California, in and for the County of Los Angeles, entitled Wheeler, *et al.* v. Gregg, *et al.*, No. 522031. That complaint sought to enjoin Gregg from operating under the said Permit, and was substantially identical with the Complaint in Equity filed in this proceeding. It was prepared, served and filed by the same attorneys who represent Appellees in this proceeding [Tr. Vol. I, p. 286; Vol. II, pp. 319 to 380, incl.] *and alleged that the suit was brought on behalf of plaintiffs and all others similarly situated* [Tr. Vol. II, p. 369], which includes plaintiffs in this case.

A preliminary injunction was denied in that Superior Court action [Tr. Vol. I, p. 286] and after a trial before Hon. Alfred L. Bartlett, Judge of said Superior Court,

lasting from May 28, 1947 to September 10, 1947, a judgment was entered on September 10, 1947, in favor of defendant Gregg (Appellant herein), denying plaintiffs an injunction or damages [Tr. Vol. I, p. 287, Vol. II, pp. 458 to 461, incl.] The judgment was supported by Findings of Fact and Conclusions of Law whereby every issue was determined against the plaintiffs, including a finding that the granting of the Permit was not in violation of either the Constitution of the State of California or the Constitution of the United States, and that it was within the police power of the City. [Tr. Vol. II, p. 447.] A copy of the Pleadings and Judgment in that case appears in Tr. Vol. II, pp. 319 to 461, incl.

An appeal from that Judgment is now pending in the Supreme Court of the State of California and has not yet been determined. [Tr. Vol. I, p. 287; Vol. II, pp. 462, 463.]

On November 14, 1947, this proceeding was commenced in the District Court by certain named plaintiffs alleged to be owners of property in the vicinity of the Gregg permit area. The allegations of the Complaint are substantially identical with the Complaint in the State case and this complaint was filed by the same attorneys. Both complaints pray for an injunction and for damages. [Tr. Vol. I, pp. 2 to 264, incl.]

A temporary restraining order and Order to Show Cause was issued herein *ex parte*. Appellant filed motions to dismiss and to dissolve the restraining order and in opposition to a preliminary injunction, supported by affidavits and Points and Authorities. [Tr. Vol. I, pp. 268 to 312, incl.; Vol. II, pp. 313 to 566, incl.; Vol. II, p. 583.]

After a hearing the District Court issued a preliminary injunction which provided that it should be effective as

to the parcels north of Glenoaks Boulevard when plaintiffs (appellees herein) have filed a $5,000 bond and that it should be effective as to the parcels south of Glenoaks Boulevard when and if plaintiffs filed a $10,000 bond. It enjoined Gregg from using the property for the commercial production of rock and gravel pending the trial of the suit or the further order of the Court. [Tr. Vol. II, p. 619.] The $10,000 additional bond has not been filed and hence that portion of the preliminary injunction with reference thereto is not effective. The latter, however, does not relate to the 115 acres of land hereinabove referred to.

The Court also made an order that the operation of the injunction be stayed provided that Gregg file a bond in the sum of $50,000 conditioned upon refilling any excavation he might make in the event that the litigation is eventually decided against him. [Tr. Vol. II, p. 622.]

This appeal is from the Order of the District Court granting the Preliminary Injunction.

Specification of Errors.

A. The Court erred in granting Appellees a preliminary injunction in this:

1. That the Complaint fails to state a cause of action;

2. That the Court has no jurisdiction because no diversity of citizenship is shown;

3. That the Court has no jurisdiction because no Federal question is presented;

4. That the case does not arise under the Constitution of the United States, or under a Federal statute;

5. That the granting of the permit to Gregg does not constitute an unconstitutional taking of property without just compensation;

6. That the granting of the permit to Gregg does not constitute a denial to Appellees of due process of law;

7. That the alleged controversy is not a genuine and present one under the Constitution of the United States, but is merely conjectural;

8. That the alleged cause of action is essentially one to enjoin the commission of an alleged nuisance by Gregg and, there being no diversity of citizenship, is solely within the jurisdiction of the State Court.

9. That where the operation of a business is not a nuisance *per se,* an order or decree of Court should not enjoin more than the specific things which constitute the nuisance and should never go beyond the requirements of the particular case.

10. That there can be and as a matter of law is no estoppel with reference to the granting of the conditional use permit to Gregg, as alleged in the complaint;

11. That the wisdom or expediency of granting the permit was for the City Council to decide and is not subject to judicial review and does not present a Federal question.

12. The District Court should have declined to take jurisdiction both under the provisions of Sec. 265 of the Judicial Code (28 U. S. C. A. 379) and under the doctrine of comity, because of the prior judgment of the Superior Court of the State of California, in and for the County of Los Angeles (an appeal from said judgment being now pending in the Supreme Court of California) denying to plaintiffs in a representative suit (brought on behalf of all persons similarly situated, including the appellees herein) the identical relief sought in this proceeding.

ARGUMENT.

I.

The Complaint Fails to State Facts Sufficient to Constitute a Cause of Action on the Federal Constitutional Grounds.*—1.

We realize that this appeal is taken from the Order of the District Court granting the preliminary injunction and not from the Order denying Appellant's motion to dismiss. However, we deem it proper to consider whether or not the complaint states a cause of action in order to determine the propriety of the Order granting the preliminary injunction, because if the District Court did not have jurisdiction of the case, it did not have authority to grant the preliminary injunction.

In approaching a consideration of the above stated proposition, there are only two factors to consider:

(a) Does the complaint state facts sufficient to sustain a finding that the act of granting Gregg a conditional use permit so as to expressly permit the use of his own land for the commercial production of rock and gravel, was not a proper exercise of the police power?

(b) Does the complaint state facts which would be sufficient to sustain a finding that the plaintiffs' (Appellees herein) have or possess property rights which are taken from them by the granting of the permit to Gregg?

With reference to proposition (a): Fundamentally, Gregg's right to remove rock and gravel from his *own* land does not derive from the permit. That right is inher-

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*Arabic numbers following captions refer to corresponding numbers in our Specification of Errors.

ent in Gregg's ownership of the land. His right to remove rock and gravel from his own land is inseparable from his ownership of the fee title to that land. Unless and until *prohibited* by an exercise of the police power of the City of Los Angeles, Gregg had an unquestioned right to operate on any rock and gravel land owned by him.

The adoption of the zoning regulation by the City of Los Angeles, Ordinance No. 90,500 [Tr. Vol. I, p. 61 *et seq.*] was a *suspension* of that inherent right by an exercise of the police power. But the *right,* as distinguished from the permissability to remove rock and gravel from his own land does not stem from or arise out of any action of the City Council, whether such action be valid or invalid.

Therefore, the act of the City Council in granting Gregg a conditional use permit did not create in Gregg any right which he had not theretofore possessed. It merely removed an *artificial impediment* and reinstated him in the inherent right which he had always possessed. By granting the permit the City Council simply surrendered the power to object to the exercise by Gregg of a right which he (and his predecessors in interest) always possessed as the owner of the property, until the adoption by the City of its zoning regulations; a right which he (and his predecessors in interest) had a right to exercise even after the adoption of the zoning ordinance, unless the adoption of the zoning ordinance was a reasonable and proper exercise of the police power.

Let us assume that Gregg had not applied for a permit but had simply commenced excavation on his own land. Would there be any Federal question involved? It is apparent that there would not be. It is also apparent that

if the City of Los Angeles attempted to enjoin Gregg from so proceeding in the absence of a permit that Gregg himself would be in a position to enjoin the City from interferring with his operations.

As is disclosed by affidavits in this record [Tr. Vol. II, pp. 463 to 520, incl.], the Superior Court in California by final judgment has twice enjoined such interference by the City of Los Angeles under similar circumstances.

As said in the case of *Sterling v. Constantin*, 287 U. S. 378, 77 L. Ed. 375:

> "The existence and nature of complainants' rights are not open to question. Their ownership of the oil properties is undisputed. Their right to the enjoyment and use of these properties subject to reasonable regulation by the State in the exercise of its power to prevent unnecessary loss, destruction and waste, is protected by the due process clause of the Fourteenth Amendment. Ohio Oil Co. v. Indiana, 177 U. S. 190, 44 L. Ed. 729, 20 S. Ct. 576; Lindsley v. National Carbonic Gas Co., 220 U. S. 61, 55 L. Ed. 369, 31 S. Ct. 337; Walls v. Midland Carbon Co., 254 U. S. 300, 65 L. Ed. 276, 41 S. Ct. 118; Bandini Petroleum Co. v. Superior Court, 284 U. S. 8, 76 L. Ed. 136, 52 S. Ct. 103."

The permit granted to Gregg does not restrict the Appellees in the use of their *own* property. It is merely permissive to Gregg, and not restrictive as to the Appellees.

How can it be said that it was not within the province of the City Council to merely remove an artificial impediment to the use by Gregg of his own property for lawful purposes?

How can it be said that the lawful use by *Gregg* of his own property constitutes an improper exercise by the *City of Los Angeles* of its police power?

The failure of a municipality to place restraint upon the use of certain property, or its refusal to do so, does not constitute an improper exercise of police power. It cannot be forced to impose restrictions upon the use of property and if the municipality does not see fit to act, as regards a particular property, no adjoining property owner can force it to do so.

Failure to do so might render invalid restrictions placed on the neighbors' property. But the neighbor has no right to *require* the municipality to restrict adjacent land in which he has no ownership.

Hence, the Appellees here have no right to demand that the municipality exercise its police power so as to prevent Gregg from using his property for the production of rock and gravel. The failure of the City to do so might invalidate the restrictions existing as to *Appellees'* property as being unreasonable under the circumstances, but that factor gives Appellees no vested right in the maintenance of restrictions on the Gregg property.

Pertinent here is the language of the Supreme Court of the United States in *Gully v. First National Bank,* 299 U. S. 108, 81 L. Ed. 70:

> "The argument for respondent proceeds on the assumption that because permission at times is preliminary to action, the two are to be classed as one. But the assumption will not stand. A suit does not arise under a law renouncing a defense, though the result of the renunciation is an extension of the area of legislative power which will cause the suitor to prevail."

But let us assume, without conceding, that the City Council did act unreasonably in granting the Gregg permit. That fact, if true, would not standing alone raise a Federal question. That would be a matter of State cognizance only. In order to constitute a Federal question it would be necessary to establish that the alleged unreasonable act resulted in depriving the Appellees of some property right without due process of law in contravention of the Fourteenth Amendment.

(b) Does the complaint state facts which would be sufficient to sustain a finding that the plaintiff's (Appellees herein) have or possess property rights which are taken from them by the granting of the permit to Gregg?

To sustain such a proposition it would be necessary as a matter of law to hold that every property owner has a vested right, a property right, in the perpetual maintenance in *status quo* by the municipality of the zoning regulations on his neighbors' property. This is untenable.

The theory of vested rights as respects zoning or rezoning relates only to such rights as the owner of property may possess not to have his *own* property re-zoned so as to prohibit a particular use, after he has commenced the operation of the use of his *own* property pursuant to a prior zoning regulation.

This well established principle does not give Appellees any vested or property right to prevent the use by *other* owners of *their* property for such purposes as may be legally permissible. It does not give Appellees any vested or property right in the continuance or imposition of zoning regulations on Gregg's property so as to prevent or preclude the use by him of his *own* property for a

purpose lawful in itself and inherent in his ownership of said property.

This has been universally recognized by the Courts of practically every jurisdiction. Thus, in *Reichelderfer v. Quinn,* 287 U. S. 315, 77 L. Ed. 331, 53 Sup. St. 177, the owners of residential property in the District of Columbia sought to enjoin the District Commissioners from erecting a fire house near their own residential properties, upon the grounds that the statute authorizing the construction of the fire house at that point was inconsistent with regulations under the Zoning Act for the District of Columbia, in that the structure was to be erected in an area theretofore designated as a park. It was conceded that the presence of such a structure would diminish the attractiveness of adjoining residential property and in consequence decrease its value.

It was contended that the adjoining property owners had a valuable right appurtenant to their land, in the nature of an easement, to have the adjoining land used for park purposes, and that the Act of Congress, directing its use for other purposes, constituted a taking of their property without due process of law and without just compensation. The Court rejected this contention.**

It is interestng to note that the contentions made by the respondents in the *Reichelderfer* case are substantially the same as in the case at bar. In the case at bar Appellees contend that because their land is, and Appellant's land had, at one time been zoned for residential use, that such zoning created a higher value for their,

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**Quotations from this and other authorities cited will be found under appropriate titles in the Appendix.

Appellees', property Further, that the change in zoning which arose by virtue of the conditional use permit granted to Gregg caused this artificially enhanced value to be diminished. Hence, they argue, their property has been taken without due process of law and without just compensation. We submit that this theory and contention is thoroughly discredited by the decision of the United States Supreme Court just cited.

See also (in Appendix):

Clifton Hills Realty Co. v. Cincinnati, 60 Ohio App. 443, 21 N. E. (2d) 993;

Eggeben v. Sonnenberg (Wisconsin), 1 N. W. (2d) 84;

Marblehead Land Company v. Los Angeles, 36 F. (2d) 242, 47 F. (2d) 528 (C. C. A. 9, certiorari denied, 284 U. S. 634, 76 L. Ed. 540;

Chayt v. Maryland Jockey Club (Md. Sup. Ct.), 18 A. (2d) 856;

People ex rel Miller v. Gill, 389 Ill. 394, 59 N. E. (2d) 671.

As already stated, the only instance in which the doctrine of vested rights may be invoked is where a property owner in reliance upon the zoning ordinance has erected a building or commenced a use on his *own* property prior to the change in zone. He has no vested right in the maintenance of the zoning ordinance with regard to other persons' property. This principle was recognized by the Supreme Court of California in *Jardine v. City of Pasadena,* 199 Cal. 64 at 74, where the Court said:

"There can be no question but that a municipality has the right to amend its zoning ordinance from time

to time as new and changing conditions warrant and require such revision."

The Court held in the *Jardine* case that it was immaterial if the consequence of such rezoning was that the value of the surrounding land for residential purposes might be depreciated. It held that such possibility did not deprive the municipality of the exercise of its police power.

In *Hollearn v. Silverman,* 338 Pa. 345, 12 A. (2d) 292, an action was brought by property owners to restrain an adjoining property owner and the officers of a municipality from changing, by an amendment to the zoning ordinance, the classification of the defendant property owners' property from residential to commercial. In sustaining a demurrer, the Court said:

> "The prayer of the bill is to restrain enforcement of the ordinance of 1939, which neither prohibits plaintiffs from doing, nor requires them to do anything on their respective properties. They enjoy these as they did before. Their contention is that if the defendant property owner is permitted to conduct stores, the fact that he may do so will result in depreciation of the value of their property. If it does, the result is *damnum absque injuria.* The original zoning ordinance . . . gave plaintiffs no vested right which would prevent the city from subsequently amending the ordinance by adding (additional property) to the commercial zone. The power to amend the zoning ordinance was expressly conferred by the legislature. The ordinance of 1933 fixing the boundaries of the zones did not result in a contract with plaintiffs preventing the city from

subsequently changing the boundaries if the city found it desirable to change them."

See also:

Miller v. Board of Public Works, 195 Cal. 477;

Zahn v. Board of Public Works, 195 Cal. 497 at 512.

It is quite clear from the decisions that a municipality is not estopped to invoke its police powers by reason of the prior enactment of other zoning ordinances or because of private contractual restrictions in the use of property.

In the case of *Acker v. Baldwin,* 18 Cal. (2d) 341 at 345, the Court states:

". . . The police power is not subject to the mental state of realtors who lay out a subdivision. Nor may the police power be limited by private contract. Thus it has been held that a city and county may not be estopped by its conduct from requiring the removal of a cemetery, estoppel being no stronger than a contract entered into by the sovereign."

Again in *Otis v. City of Los Angeles,* 52 Cal. App. (2d) 605 at 613, the Court states:

"Even though we concede that the zoning of appellant's property for residence purposes only, depreciated its value, that fact is not of controlling significance. As was said in the case of Zahn v. Board of Public Works, 195 Cal. 497 'Every exercise of the police power is apt to affect adversely the property

> interest of somebody.' It was not a denial of plaintiffs' constitutional right to the equal protection of the laws for the City of Los Angeles to discriminate against plaintiffs by granting variances to some property owners and refusing a variance grant to plaintiffs in the same district."

But, Appellees allege, the granting of the permit to Gregg was arbitrary and unreasonable.

Arbitrary and unreasonable as to whom? Certainly not as to Gregg for he is not complaining. And if Appellees have no vested interest or property right in the maintenance of restrictive zoning on Gregg's property, which is well established as a matter of law, then they have no cause of action to complain as to arbitrary or unreasonable action affecting Gregg's property. See also *Hurley v. Commission of Fisheries,* 257 U. S. 223, 66 L. Ed. 206.

For the reasons stated, we respectfully submit that Appellees have failed to state a cause of action cognizable in the Federal Courts; that there has been no taking of Appellees' property without due process of law within the meaning of the Fourteenth Amendment. Hence, that the District Court abused its discretion in granting the preliminary injunction.

Our attention is directed to the fact that Appellees also allege a violation of the Fifth Amendment [Tr. Vol. I, p. 53]. Suffice to say that the Fifth Amendment does not pertain to State action.

II.

The District Court Has No Jurisdiction Because (A) No Diversity of Citizenship Is Shown; (B) No Federal Question Is Presented; (C) The Case does Not Arise Under the Constitution of the United States, or Under a Federal Statute; (D) The Granting of the Permit to Gregg Does Not Constitute an Unconstitutional Taking of Property Without Just Compensation; (E) The Granting of the Permit to Gregg Does Not Constitute a Denial to Appellees of Due Process of Law; and (F) The Alleged Controversy Is Not a Genuine and Present One Under the Constitution of the United States, But Is Merely Conjectural.—2 to 7 inclusive.

It is apparent that the complaint does not set forth any allegations to establish a diversity of citizenship. It is also evident that no Federal statute is involved. Therefore, the jurisdiction of the District Court exists only if the complaint states *facts* sufficient to sustain a finding that the granting of the Gregg permit is in violation of the Fourteenth Amendment.

The Fourteenth Amendment has generally been applied as a limitation on the police power of the States. Thus, when applied to zoning, the Supreme Court of California in the recent case of *Wilkins v. City of San Bernardino*, 29 Cal. (2d) 332, 340, made the following classification of the cases in which zoning ordinances have been held to violate the constitutional limitations as being unreasonable when applied to particular property:

"1. Where the zoning ordinance attempts to exclude and prohibit existing and established uses or businesses that are not nuisances.

2. Where the restrictions create a monopoly.

3. Where the use of adjacent property renders the land entirely unsuited to, or unusable for, the only purpose permitted by the ordinance.
4. Where a small parcel is restricted and given less rights than the surrounding property, as where a lot in the center of a business or commercial district is limited to use for residential purposes, thereby creating an 'island' in the middle of a larger area devoted to other uses."

If the zoning regulation complained of does not fall within one of these four categories it is not unreasonable or arbitrary and hence not unconstitutional. Therefore, unless the Gregg permit comes within one of the four classifications set forth above, there is no violation of the Fourteenth Amendment and no Federal question is involved which would give the District Court jurisdiction to grant the preliminary injunction.

Let us examine the record in this case with reference to these well establishes principles.

1. There is no allegation or evidence that the effect of the Gregg permit is to *prohibit or exclude* established uses, or businesses.

2. There is no allegation or evidence that the effect of the Gregg permit is to create a monopoly, unless such can be inferred from the allegations of paragraph XXXIX of the complaint [Tr. Vol. I, p. 54] that "the real purpose of the eleven members of the City Council of said defendant city . . . was for the purpose of preferring said John D. Gregg as against all other property owners within said 'community' area, in the use and enjoyment of their properties within said area . . ." and the most that can be said of that allegation is that it is an attempt

to allege a violation of Article I, Section 21 of the Constitution of the State of California, which provides in part:

> "Nor shall any citizen or class of citizens be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens."

A violation of the State Constitution is for the State Courts to adjudicate and raises no Federal question.

Furthermore, if it be contended that the allegation raises an issue under the equal protection clause of the Fourteenth Amendment, we submit that it is insufficient because in order to raise the question of the constitutionality of a statute or ordinance alleged to be diiscriminatory in its nature or operation, and therefore to deny the equal protection of the law, the party complaining must show that he is a person or a member of a class of persons actually or presently aggrieved. If a person does not belong to a class discriminated against, he cannot complain of alleged discrimination. If one would assail a law as being unconstitutional and a denial of equal protection, he must allege and prove the facts which clearly show that the features of the law complained of *necessarily* operate to deprive him of some constitutional right or the enjoyment of some constitutional privilege.

In the recent case of *Queenside Hills Realty Co., Inc., v. Saal* (1946), 328 U. S. 80, 90 L. Ed. 1096, a law of New York required that non-fireproof lodging houses existing *prior* to the enactment of the law should comply with certain requirements including the installation of automatic sprinkling systems. It was contended that the law violated the equal protection clause in that it was applicable to lodging houses "existing" prior to the 1944

law but not to identical structures erected thereafter. The Court refused to recognize this contention. (See Appendix.)

Applying these principles to the case at bar we find that the Zoning Ordinance provides [Tr. Vol. I, p. 162] that the Planning Commission after public hearing may permit the development of natural resources in zones from which such uses are otherwise prohibited, provided such uses are deemed essential or desirable to the public convenience or welfare. It also provides [Tr. Vol. I, p. 165] for an appeal to the City Council by any person aggrieved by a decision of the Commission.

There is no allegation in the complaint and no evidence that any of Appellees have ever applied to the Commission for a conditional use permit. It obviously follows that they have not been discriminated against because they have never sought to obtain a permit which they, in common with all other citizens, are entitled to seek under the terms of the Ordinance. If they had applied for and had been refused a permit, while Gregg had been granted a permit, then they could possibly enjoin the enforcement of restrictive zoning against their *own* property, but that would not give rise to a cause of action against Gregg to enjoin him from acting under his *own* permit on his *own* land.

This is not merely an academic discussion of abstract principles of law. It has been applied by our Courts time and time again to specific factual situations.

In the case of *People v. Globe Grain & Milling Co.*, 211 Cal. 121, a statute had been enacted by the legislature prohibiting the taking of sardines for reduction purposes unless and until a permit therefor had been granted by the Fish and Game Commission. The statute further

provided that the Commission could grant revocable permits in such amount and to such persons as it determined, providing that it appeared to the satisfaction of the Commission that such use of sardines would not result in waste or depletion of the species. It was contended that this statute was unconstitutional in that it granted to the Commission an uncontrolled discretion and permitted discrimination between applicants. It appeared that the party attacking such Act as unconstitutional had not applied for and had not been denied a permit. The Court held that such non-applying person was not a person nor a member of a class of persons discriminated against and was therefore not entitled to question the constitutionality of the statute. (See Appendix.)

This same principle was enunciated by the United States Supreme Court, in the case of *Monongahela Bridge v. United States,* 216 U. S. 177, 195; 54 L. Ed. 435, in which case the Court held that speculation to the effect that a statute might be administered in a discriminatory manner was not sufficient to entitle plaintiff to attack the statute until plaintiff had actually been discriminated against.

See also:

United States v. Superior Court, 19 Cal. (2d) 189 at 197;

Ritz v. Lightston, 10 Cal. App. 685.

Applying the constitutional provision and the decisions to the allegations of the complaint in the case at bar, it becomes obvious that plaintiffs have utterly failed to allege facts sufficient to attack the constitutionality of

Section 12.24 of Ordinance 90,500 or of the act of the City Council in granting defendant Gregg his Conditional Use Permit as being discriminatory or denying equal protection of the laws. The plain language of the ordinance permits any person at any time to apply for a Conditional Use Permit to develop on his property any natural resource or any other permissible use. It is well settled that the mere speculation that if they did so apply they might be denied a permit is insufficient to entitle these plaintiffs to question the constitutionality of Section 12.24 or to attack the act of the City Council. We therefore respectfully submit that the complaint is wholly deficient in this regard.

3. The third category defined by the California Supreme Court is:

> "3. Where the use of adjacent property renders the land entirely unsuited to or unusable for the only purpose permitted by the ordinance."

This classification clearly has no significance in the case at bar, for it refers to restrictions placed upon the property of the aggrieved person and while it would entitle him to enjoin the enforcement of such restrictions as to his *own* property, it would not entitle him to enjoin the use of his neighbor's property unless the operation constituted a nuisance, which would be a State and not a Federal question.

4. The fourth category above referred to obviously has no application to the instant case.

There is another reason why no Federal question is involved in this case.

The complaint in paragraph XXII [Tr. Vol. I, p. 33] alleges:

> "That the conduct of the eleven members of said City Council at the session of said City Council whereat said appeal of said defendant John D. Gregg was considered, and said variance permit was granted, and who controlled the deliberations and action of said City Council in respect of said matter, was arbitrary, unreasonable, unfair *and in excess of the limits of their authority.*" (Italics added.)

It follows that if the action of the City Council in directing the issuance of the permit was, as alleged, "in excess of the limits of their authority," then their purported action was no action at all, and this under the State law, regardless of the provisions of the Fourteenth Amendment to the Constitution of the United States. Hence, such action was not State action, but the unauthorized action of certain individuals.

Innumerable cases have held, and it is beyond question, that the Fourteenth Amendment applies only to State action or to the action of a subdivision or agency of the State, including municipalities, or to the action of officials of a State or its subdivisions, where they are authorized by law to act. The Fourteenth Amendment has no application to acts of individuals.

For example, if an official is authorized by law to administer a certain law and in so doing he acts un-

reasonably, then that is State action which comes within the purview of the Fourteenth Amendment. But if he acts without any authority at all, such act is not the act of the State—it is the act of the individual and not within the scope of the Fourteenth Amendment.

Consider the allegation of the complaint that the Councilmen acted "in excess of the limits of their authority." He who so acts necessarily acts with no authority whatever, for when he goes beyond the limits he leaves his authority behind him. He immediately becomes amenable to State law and the State Courts for his unlawful individual act, but that act without authority is not the act of the State as contemplated by the Fourteenth Amendment.

See (for quotations refer to Appendix):

Mayor etc. of City of Savannah v. Holst (C. C. A. 5), 132 Fed. 901.

Also:

Snowden v. Hughes (C. C. A. 7), 132 F. (2d) 476;

Swank v. Patterson (C. C. A. 9, 1943), 139 F. (2d) 145;

American Federation of Labor v. Watson, 327 U. S. 582, 90 L. Ed. 873 (1946);

Armour & Company v. City of Dallas, 255 U. S. 280, 65 L. Ed. 635;

Jones v. Oklahoma City (C. C. A. 10, 1935), 78 F. (2d) 860;

Harness v. City of Inglewood (D. C., D. Colo., 1936), 15 Fed. Supp. 140 at 143-4;

Missouri Utilities Co. v. City of California (D. C., W. D. Mo., 1934), 8 Fed. Supp. 454.

In our case, it is alleged that the act was in "excess of the limits of their (the City Council's) authority." Assuming, but not conceding, this allegation to be true, such act in effect is alleged to be in violation of the City Charter which is the source of all authority for the municipality of Los Angeles. The City Charter having been enacted as an Act of the State Legislature, a violation of it is a clear violation of State law. This being so, the allegedly *unlawful* and *unauthorized* act of the Councilmen was not the act of the State so as to bring it within the scope of the Fourteenth Amendment.

If, as Appellees allege in their complaint [Tr. Vol. I, p. 53], Gregg is acting under a void permit, then that permit is no permit at all, and certainly whatever Gregg is doing, he is doing as an individual. It is alleged in the complaint that what Gregg intends *to do* will interfere with the comfortable enjoyment by Appellees of their respective properties. Certainly this is not a cause of action which would come within the purview of the Fourteenth Amendment. Hence no Federal question is here involved.

Owensboro Water Works Co. v. Owensboro, 200 U. S. 38, 50 L. Ed. 351 (see Appendix);

Defiance Water Company v. Defiance, 191 U. S. 184 (see Appendix).

III.

The Alleged Cause of Action Is Essentially One to Enjoin the Commission of an Alleged Nuisance by Gregg and, There Being No Diversity of Citizenship, Is Solely Within the Jurisdiction of the State Courts.—8.

Insofar as Gregg is concerned the Appellees are plainly seeking to enjoin him from operating his property on the theory that such operation is an anticipated nuisance. This is evident from the allegations of the complaint, paragraphs XXVI, XXVII, XXVIII, XXIX and XXXVI. [Tr. Vol. I, pp. 36, 37, 38, 51.]

There being no diversity of citizenship, a cause of action for the abatement of a nuisance is not a Federal question. The aggrieved persons have an adequate remedy by recourse to the State courts.

If it be argued that the existence of a nuisance would deprive Appellees of property without due process of law, and that therefore a Federal question is raised, such argument is manifestly unsound. If such a nuisance did exist, it would be the result of individual action by Gregg and not State action as contemplated by the Fourteenth Amendment. The nuisance, if it did exist, *would not arise from the granting of the permit to Gregg.* It would arise from the act of an individual in the methods employed by the individual in the operations to be conducted on the subject property.

This is necessarily so, because the business of excavating for rock and gravel from lands belonging to an individual is not a nuisance *per se,* but is a lawful and useful occupation. Therefore, it cannot be said that the City Council by *its* act granted Gregg a permit to commit a

nuisance and that hence the alleged nuisance is the act of a State agency.

To further illustrate the point that the City Council in granting the Gregg permit is not vulnerable to the charge that its act constituted the granting of a permit to commit a nuisance, the rule of law is that whenever it is sought to enjoin an anticipated nuisance, as distinguished from an existing nuisance, it must be shown (a) that the proposed operation or use to be made of the property will *necessarily* be a nuisance *per se,* or (b) that while it may not amount to a nuisance *per se,* nevertheless, under the circumstances of the case, a nuisance must *necessarily* result from the contemplated act. The injury must be actually threatened, not merely anticipated; it must be practically certain, not merely probable.

This principle of law is very aptly stated by the Supreme Court of Pennsylvania in the case of *Pennsylvania Company v. Sun Company,* 290 Pa. 404, 138 Atl. 909. In that case it was alleged that the defendant intended to erect upon adjoining property large tanks for the storage of 150,000 gallons of oil and its by-products. It was alleged that the maintenance of these tanks would constitute a nuisance and a petition was filed for an injunction to prohibit such alleged anticipated nuisance. The Court refused to enjoin the erection of said tanks, because it was not shown that a nuisance would *necessarily* result from the intended use. (For quotation see Appendix.)

In *People v. Hawley,* 207 Cal. 395, there was a claim that the operation of a gravel pit in the Arroyo Seco constituted a nuisance by reason of the smoke, noise and

dust created by a steam shovel engaged in excavation, and stagnant pools of water which gathered in the excavation, and the danger of erosion to surrounding property. The Court refused to prohibit the conduct of the business and instead ordered that the stagnant water be drained off and disposed of and the depressions wherein the water had gathered be filled up and made the future operations of the company dependent upon compliance with said requirements and the substitution of an electric for a steam shovel and required that the excavations be kept sprinkled to avoid dust and that adequate protection be given to adjoining property to prevent erosion. Upon these conditions the Court allowed the company to continue its operations. It is significant to note that these conditions are very similar to the conditions prescribed by the Conditional Use Permit in the case at bar.

As further establishing the fact that the act of the City Council cannot be construed as the granting to Gregg of a permit to create a nuisance, and thereby be construed as bringing the alleged anticipated nuisance within the cognizance of the Fourteenth Amendment as being State action, let us consider the terms of the conditional use permit itself. [Tr. Vol. I, pp. 30, 282, 283.] The permit provides:

"1. That the applicant construct a 6-foot cyclone type mesh wire fence around the said property, including barbed wire on the top of said fence providing the Fire Department grants permission for same.

"2. That no permanent plant building or structure be installed or maintained on said property and that all material excavated be mined by an electrically powered shovel and primary crusher and transported by a conveyor belt system running through a tunnel or tunnels under Glenoaks Boulevard to the plant now owned and operated by applicant, lying southwesterly of said boulevard and processed at said plant.

"3. That a setback line of fifty feet from all property lines and existing streets be maintained and that slopes of excavations be maintained at one foot to one foot.

"4. That the area between all property lines or street line and 50 foot setback be screen planted progressively as excavated."

These terms were obviously designed to prevent the operations from becoming a nuisance. In addition, the record shows that Hon. Alfred L. Bartlett, Judge of the Superior Court who tried the identical issues in the State Court case, by the judgment entered therein imposed certain additional conditions designed to prevent the creation or maintenance of a nuisance [Tr. Vol. II, pp. 460, 461], as follows:

"1. That defendant John D. Gregg shall not conduct any operation for the excavation of rock, sand or gravel from the so-called 'Critical' area, as described in the complaint herein lying northeasterly of Glenoaks Boulevard, at any time before 6:00 o'clock a. m. of any day or after 8:00 o'clock p. m. of any day, excepting that the said defendant John D. Gregg shall not be prohibited from making any reasonable or necessary repairs to equipment in said area during other hours.

"2. That said defendant John D. Gregg house in any primary crusher which is operated in that portion of the so-called 'Critical' area lying northeasterly of Glenoaks Boulevard so as to minimize any noise emanating therefrom.

"3. That in connection with any and all drag-line operations on the banks or slopes of any pit excavated by defendant John D. Gregg in that part of the so-called 'Critical' area lying northeasterly of Glenoaks Boulevard, that the said defendant John D. Gregg shall cause the banks or slopes of said excavation to be sprinkled with water prior to any such drag-line operations so as to minimize the possibility of dust from any such operation being carried by the winds beyond the outer boundaries of said so-called 'Critical' area.

"4. That said defendant John D. Gregg, as soon as is reasonably practicable and as soon as material and equipment is available, shall complete the construction of the dust collection system in his rock crusher plant located southwesterly of Glenoaks Boulevard, the construction of which system was commenced prior to the commencement of this action."

Gregg's affidavit [Tr. Vol. I, pp. 283, 284] shows that he has complied with these conditions. All of these matters were before the District Court. Appellant respectfully urges that in the light of all these circumstances and facts it was error for the District Court to issue a preliminary injunction herein.

IV.

Even if a Federal Question Were Involved, the Court Erred in Granting the Preliminary Injunction Absolutely Enjoining and Restraining Gregg From Excavating or Conducting Any Other Operation for the Production of Rock, Sand or Gravel Within or Upon His Property Because Where the Operation of a Business Is Not a Nuisance Per Se, a Decree Should Not Enjoin More Than the Specific Things That Constitute the Nuisance, and Should Never Go Beyond the Requirements of the Particular Case.—9.

Pomeroy's Equity Jurisprudence, 2d Ed., Vol. 5, Secs. 1945, 1948 (see Appendix);

Judson v. Los Angeles Suburban Gas Company, 157 Cal. 168.

We submit that even if a Federal question were involved in this case, nevertheless the District Court went beyond the bounds of propriety in granting a preliminary injunction *absolutely* prohibiting the Gregg operation.

No interlocutory injunctive relief should have been granted in any event, beyond that which might be deemed necessary to prevent the occurrence of those things of which Appellees complain, to-wit, noise and dust alleged to emanate from the operation, injury to the aesthetic sense and possible erosion. Incidentally all these possibilities are adequately provided against by the terms of the Gregg permit and the judgment in the prior State suit.

As was stated in the case of *People v. Hawley,* 207 Cal. 395, *supra,* the business of excavating rock and gravel by the owner from lands belonging to him is a lawful, necessary, and useful occupation, and the regu-

lation thereof should go no further than to control those particular features of the operation which might be objectionable to others. In the *Hawley* case the Court held that the excavating operations could not be prohibited *in toto* and that so long as the defendant complied with the order of the Court by substituting an electric for a steam shovel and by keeping the excavations sprinkled to avoid dust, and by preventing the collection of stagnant water, the excavating operations might continue. (For quotation see Appendix.)

The case of *In re Smith,* 143 Cal. 368, involved an attempt to prohibit the operation of a gas plant. In holding that the ordinance prohibiting its operation was void, the Court states:

> "It will not be disputed that the business here sought to be prohibited is not only legitimate and useful, but even necessary, to our present civilization. Moreover, under the very terms of our constitution, it is a recognized lawful occupation. (Const. Cal., art. XI, sec. 19.) The county of Los Angeles, therefore, has no power to prohibit the manufacture of gas, though it may, in the legitimate exercise of its powers, regulate its manufacture and the places thereof."

The case of *In re Kelso,* 147 Cal. 609, involved an ordinance absolutely prohibiting the operation of a stone quarry in the city of San Francisco. The Court held the ordinance to be void and in so holding stated as follows:

> "We can see no valid objection to the work of removing from one's own land valuable deposits of rock or stone that may not be entirely met by regulations as to the manner in which such work shall be

done, and this being so, we are satisfied that an absolute prohibition of such removal under all circumstances cannot be upheld."

In the case of *In re Throop,* 169 Cal. 93, there was an ordinance adopted by the city of South Pasadena prohibiting the maintenance of a stone crusher in a certain portion of the city. The Court held the ordinance void in the following language:

"The unreasonable restrictions as to the place where a stone crusher may or may not be erected or maintained render the ordinances void.

"Concrete has become a very important factor in the construction of improvements in our cities and towns and in the construction of roads and highways. Rock, sand, gravel, and cement are necessary ingredients in concrete construction and must be obtained. The business of producing these materials, if maintainable within the confines of a city or county without becoming a public nuisance or offensive to the health, comfort, safety, or welfare of the inhabitants, cannot by legislative bodies be arbitrarily suppressed or interfered with.

"The city of South Pasadena in the exercise of the police power vested in it by our state constitution has the undoubted right to regulate the business of operating a stone crusher within the city limits, but such ordinance must be reasonable and must be for the purpose of protecting the public health, comfort, safety, or welfare. As stated by the supreme court

of the United States in *Dobbins v. Los Angeles,* 195 U. S. 223, (49 L. Ed. 169, 25 Sup. Ct. Rep. 18), 'It may be admitted that every intendment is to be made in favor of the lawfulness of the exercise of municipal power, making regulations to promote the public health and safety and that it is not the province of courts, except in clear cases, to interfere with the exercise of the power reposed by law in municipal corporations for the protection of local rights and the health and welfare of the people in the community.' "

In the case of *Byers v. Colonial Irrigation Company,* 134 Cal. 553, an action was commenced to abate the maintenance of a dam constructed by a defendant on the grounds that it constituted a nuisance and interfered with plaintiff's water rights. The Court refused to order the removal of the dam but issued an injunction enjoining the defendant from maintaining and using the dam in such manner as to obstruct the flow to plaintiff's lands of water to which plaintiff was found to be entitled and from maintaining and using the dam so as to interfere with the rights of the plaintiff as determined and defined by the findings and the judgment. In commenting upon the form of the injunction the Court made the following statement:

"As to the former point, it is not found that the dam is a nuisance in itself, but only that it is a nuisance as it had been used, and the court would not have been justified in directing its total abatement or removal. In such cases a 'total destruction

of the property should not be decreed.' It is sufficient that the party be enjoined from using the structure complained of in such a manner as to make it a nuisance. (Fresno v. Fresno Canal etc. Co., 98 Cal. 183, 184; McMenomy v. Baud, 87 Cal. 134; Lorenz v. Waldron, 96 Cal. 249.)"

In *McMenomy v. Baud,* 87 Cal. 134, plaintiff and defendant owned adjoining property. Plaintiff resided with his family on his property while defendant resided with his family on his property. Defendant, however, operated a small brass factory on the ground floor of his house. The space between the two houses was only 5 or 6 inches. Plaintiff brought this action for damages and injunction against the operation of the foundry, claiming that the same constituted a nuisance. The trial court enjoined the operation of the foundry. On appeal the Supreme Court reversed the judgment and remanded the cause for a new trial holding that the nuisance could be abated by controlling the method of operation and it was, therefore, improper to issue a prohibitive injunction as to the entire operation. (For quotation see Appendix.)

In 39 Am. Jur. 443-446, we find an interesting statement on this subject. Likewise in 43 Corpus Juris Secundum 934-935. And in 20 Cal. Jur. 329-330.

In *McPheeters v. McMahon,* 131 Cal. App. 418, an injunction was sought against the operation of a dance hall on the grounds that it disturbed the peace and comfort of nearby residents. The trial court granted an injunction and on appeal the judgment was reversed on

the ground that the injunction was improper in that it restrained the operation of a lawful business rather than merely restraining the specific things which were objectionable. The Court stated:

> "It is evident from the nature of the business here involved that it may be carried on without annoyance. . . . The rule applicable in such cases, and where appropriate facts are alleged and proven, is that a court of equity will not enjoin the conduct of the defendants entire business, where such business is not a nuisance *per se,* if a less measure of restriction will afford the plaintiff the relief to which he may be entitled." (Citing *Vowinckel v. Clark & Sons,* 216 Cal. 156; *McMenomy v. Baud,* 87 Cal. 134; *Williams v. Blue Bird Laundry Co.,* 85 Cal. App. 388.)

To the same effect is the case of *Thompson v. Kraft Cheese Co.,* 210 Cal. 171.

The case of *Vowinckel v. Clark & Sons,* 216 Cal. 156, was an appeal from a judgment for plaintiff in an action to enjoin defendant's operation of its factory unless and until it should make certain changes to prevent injury to a neighbor. Defendant for many years had operated a sewer-pipe and tile manufacturing factory in the city of Alameda, in a district which was partly industrial and partly residential. Plaintiff resided on the neighboring property and complained regarding injuries to the peaceful enjoyment of the premises by reason of soot, smoke and noise emanating from the adjoining factory. The

judgment decreed that defendant be enjoined from operating the factory unless and until he comply with certain specified conditions which were designed to eliminate the smoke and noise. Defendant appealed, and the Supreme Court in affirming the judgment stated:

> "In the present case the court appears to have given due consideration to the situation of defendant. This is apparent from the fact that it refused to abate entirely the defendant's operations and granted relief sought to the extent necessary to preserve the rights of both parties. In other words, the court in the exercise of equity powers has compared consequences and has considered the injuries resulting to each party, on the one hand if the injunction be wholly denied, on the other if it be granted. The court, from the evidence presented, gave heed to the rule that in a proper case it will not enjoin the conduct of the defendant's entire business, where such business is not a nuisance *per se,* if less measure of restriction will afford the plaintiff the relief to which he may be entitled." (Citing several cases.)

We respectfully submit that regardless of whether or not a Federal question exists, the Court exceeded the bounds of propriety in issuing an interlocutory decree enjoining all operations on the Gregg property, unless a $50,000 bond was posted to insure refilling of the pit should judgment ultimately go against appellant. If any preliminary injunction were proper, it should have been strictly limited in accordance with the authorities cited.

V.

There Can Be and as a Matter of Law Is No Estoppel With Reference to the Granting of the Permit to Gregg.—10.

Appellees have devoted a large part of their complaint herein in attempting to develop a rather vague and obscure theory of estoppel. Many pages of the complaint are devoted to allegations of matters of inducement leading up to the allegation (which is only a conclusion of law) that Gregg is estopped to operate under the permit and that the city is estopped to grant the permit. [Tr. Vol. I, pp. 7 to 27, incl.; p. 56.] In fact this complaint appears to contain as many diverse theories, none of them sound, as a false diamond has facets.

As stated in 19 American Jurisprudence, pages 601-603, estoppels are of three kinds, (1) by record, (2) by deed, and (3) by matter *in pais:*

> "(1) An estoppel by record is the preclusion to deny the truth of matters set forth in a record, whether judicial or legislative, and also to deny the facts adjudicated by a court of competent jurisdiction.
>
> "(2) An estoppel by deed is a bar which precludes one party to a deed and his privies from asserting as against the other party and his privies any right or title in derogation of the deed, or from denying the truth of any material facts asserted in it.
>
> * * * * * * * *
>
> "To constitute an estoppel by deed, a distinct and precise assertion or admission of a fact is necessary. Hence, an estoppel by deed or similar instrument can arise only where a party has conveyed a precise or

definite legal estate or right by a solemn assurance which he will not be permitted to vary or to deny. Such estoppel should be certain to every intent.

"(3) Equitable estoppel or estoppel *in pais* is the principle by which a party who knows or should know the truth is absolutely precluded, both at law and in equity, from denying, or asserting the contrary of, any material fact which, by his words or conduct, affirmative or negative, intentional or through culpable negligence, he has induced another, who was excusably ignorant of the true facts and who had a right to rely upon such words or conduct, to believe and act upon them, thereby, as a consequence reasonably to be anticipated, changing his position in such a way that he would suffer injury if such denial or contrary assertion were allowed." (19 American Jurisprudence, p. 634.)

Estoppel by contract is similar to and governed by the same rules as estoppel by deed. Therefore we may limit our discussion on this subject to (a) technical estoppel (*i. e.,* estoppel by record, deed or contract), and (b) estoppel *in pais,* or equitable estoppel.

That there is no estoppel by deed, contract or record is too clear for argument, because

(A) There is no record, judicial or legislative, the truth of which either Gregg or the City seeks to deny; neither is there any inconsistent pleading by either of them;

(B) There is no deed or contract executed by either Gregg or the City with Appellees which would operate as an estoppel. Hence, the question, if any, relates to an estoppel *in pais.*

(C) There is no estoppel *in pais,* because:

(1) neither Gregg nor the City seeks to deny or assert the contrary of, any material fact;

(2) neither Gregg nor the City, by words or conduct, affirmative or negative, has, intentionally or through culpable negligence, induced plaintiffs, or any of them, to believe or act upon any of the words or conduct of Gregg or the City;

(3) none of the plaintiffs was excusably ignorant of the true facts;

(4) none of the plaintiffs had any right to rely on any words or conduct of either Gregg or the City;

(5) assuming, without conceding, that plaintiffs (without any justification, however) may have believed and acted upon some words or conduct of the City, none of them believed or acted upon any words or conduct of Gregg;

(6) none of the plaintiffs, as a consequence reasonably to be anticipated from any words or conduct of either Gregg or the City, changed his position in a way that he suffered, or will suffer, injury if such denial or contrary assertion be allowed.

In short, none of the elements of estoppel is present as against Gregg, and at least all but one is absent as against the City.

As to Gregg, of course, there can be no estoppel. There is no fiduciary or contractual relationship or privity between Gregg and any of the Appellees out of which an equitable estoppel could arise.

In the case of *Estate of Hurley,* 28 Cal. App. (2d) 584, 590, the Court states:

> "It seems to be the established law that an equitable estoppel cannot be asserted by one who is not a party to the contract, and further, that where a contract is entered into for the sole purpose of inducing or influencing the conduct of a third party who is a stranger to the contract, the doctrine of estoppel may not be invoked. (*Coffman v. Malone,* 98 Neb. 819, 154 N. W. 726; *Booth v. County of Los Angeles,* 124 Cal. App. 259, 12 Pac. 2d 72; *Creason v. Creason,* 123 Cal. App. 455, 11 Pac. 2d 451.) An equitable estoppel can only be invoked by a party to a transaction to whom the representation was made and who acted upon such representation to his injury."

Obviously, the claim of estoppel as to Gregg is without foundation. Furthermore, it raises no Federal question as Gregg's acts were strictly the acts of an individual.

In *Davidow v. Lochman Bros.* (C. C. A. 9, 1935), 76 F. (2d) 186 at 187, the Court says:

> "Under such circumstances, the allegations of the bill are insufficient to confer jurisdiction, for it is well settled, as said in Kieman v. Multnomah County, 95 Fed. 849, that: 'The Fourteenth Amendment has reference exclusively to state action, and not to any

action by individuals. It is a prohibition upon the state to "make or enforce any law which will abridge the privileges or immunities of citizens of the United States," or which will "deprive any person of life, liberty or property without due process of law." It prohibits state legislation in violation of these rights. It does not refer to any action by private individuals. (Virginia v. Rives, 100 U. S. 313; United States v. Cruikshank, 92 U. S. 542; Civil Rights Cases, 109 U. S. 11), otherwise every invasion of the rights of one person by another would be cognizable in the Federal Courts under this amendment."

See also:

Mason v. Hitchcock (C. C. A. 1, 1939), 108 F. (2d) 134;

Marten v. Holbrook, 157 Fed. 716.

With reference to an estoppel against the City of Los Angeles. Here, again, there is no Federal question involved. Whether or not the City is estopped to exercise its police power would seem to be clearly a matter solely within the jurisdiction of the State Courts.

But if, by means of some circuitous method of reasoning, Appellees have convinced themselves that such alleged estoppel has some relationship to the Fourteenth Amendment, then we submit that their contention is untenable.

No person has a vested right in the exercise of the police power and, hence, there can be no estoppel by

reason of prior zoning ordinances or private deed restrictions.

In attempting to develop a theory of estoppel, Appellees have alleged that this area was restricted to residential use by a declaration of restrictions executed and recorded in the year 1914. It is also alleged that these restrictions expired in 1934. [Tr. Vol. I, p. 10.] How can there be any estoppel against the City of Los Angeles based upon private deed restrictions which admittedly expired by their terms fourteen years ago? Do Appellees contend that restrictive covenants can by judicial fiat be extended beyond the express terms of the restrictions? Rather, it would seem that the very terms of the restrictions would have put a prudent person on notice as to the probable use of the land for other than residential purposes upon the expiration of the restrictions. This is particularly significant because it was in the year 1934, when the restrictions expired, that Gregg commenced his rock and gravel operations directly across Glenoaks Boulevard from the property in question. [Tr. Vol. I, pp. 274, 275.]

Furthermore, Appellees' contention in that regard has been discredited by the courts. In *O'Rourke v. Teeters,* 63 Cal. App. (2d) 349, 352, the Court says:

> "Private agreements imposing restrictions are not to be considered when determining the validity of a zoning ordinance for the reason that such private agreements are immaterial."

Appellees seek further to base a plea of estoppel upon the allegations that prior to the year 1946 the subject and surrounding land had been zoned for residential purposes, and that they purchased their properties in reliance upon a belief that the zoning would remain unchanged. Yet every person is presumed to know the law and to know that under the City Charter the municipality could amend or repeal the zoning ordinances and that the very ordinances relied upon by Appellees contained provisions for variances and exceptions from the restrictive terms thereof.

The theory of such an estoppel is basically unsound. If Appellees may establish an estoppel against the City of Los Angeles under the circumstances pleaded herein, which would prevent the City from changing the zoning of an area in any respect, then we submit that any property owner in any part of the City of Los Angeles, upon the same theory, could prevent any change of zone in the area of his property. If these Appellees may as a matter of constitutional right assert an estoppel against the City of Los Angeles by reason of the fact that they may have relied upon a belief that the residential zoning would forever remain unchanged and unvaried, then we submit that any resident of the City would, as a matter of law, be entitled to raise the same estoppel any time the municipality attempted to exercise its police power in zoning matters. One can imagine the chaotic condition which would result. Such a doctrine once established, might well result in "freezing" the entire comprehensive

zoning plan of the City of Los Angeles in the mold in which it was first cast and prevent any change when opposed by an organized minority such as we have in the case at bar.

If this be the law, then we submit that the City of Los Angeles, and through it the State of California, by its very act of adopting a zoning ordinance, has abdicated its sovereignty in the administration of the police powers of the municipality insofar as zoning regulations are concerned; and the man in the street has successfully usurped the police powers vested by the Constitution of the State of California and by the Los Angeles City Charter, in the municipal government.

But we are confident that this is not the law. For in order to be the law it must first be established that every person has a vested and constitutional right to the maintenance in status quo of the zoning regulations on his neighbors' property so as to preclude a change by governmental authority in the zoning of adjoining property. We have already demonstrated the fallacy of that contention and will not unduly extend this brief by again arguing the point. It suffices to refer to the arguments and citations of authority hereinabove set forth with relation to the question of vested property rights.

We cannot believe that such an unsound and dangerous theory will ever receive the sanction of the courts. For to so hold would be to strike at the very foundation of all governmental authority heretofore so consistently held to be inherent in the police power of the state.

VI.

The Wisdom or Expediency of Granting the Permit Was for the City Council to Decide, and Is Not Subject to Judicial Review and Does Not Present a Federal Question.—11.

There are allegations in the complaint calling in to question the wisdom and expediency of, and necessity for, the permit to Gregg, and seeking to impeach the motives of the Council. [Tr. Vol. I, pp. 33, 34, 54.] These allegations raise no Federal question so as to give jurisdiction to the Federal Court.

It is well established that in the exercise of legislative or judicial powers the motives of those exercising the power are entirely irrelevant and not to be considered in a determination of the validity of the exercise of the power.

A general presumption exists in favor of the good faith of all law-making bodies. The law presumes that the law-making body considers the effect of the legislation upon the constitutional rights of citizens, and that it acts from patriotic and just motives with the desire to promote the public good, and that laws are passed in good faith. In accordance with this principle, no presumption of wrongdoing on the part of any legislative body is ever indulged in by the judiciary. One of the doctrines definitely established in the law is that if a statute appears on its face to be constitutional and valid, the Court cannot inquire into the motives of the Legislature.

Lukens v. Nye, 156 Cal. 498;

In re Wong Wing, 167 Cal. 109;

La Tourette v. McMaster, 248 U. S. 465, 63 L. Ed. 362.

When the constitutionality of an act is made to depend upon the existence or non-existence of some fact or state of facts, the determination thereof is exclusively for the legislative body and the Courts will acquiesce in its decision without an examination of the motives of the legislative body.

In the case of *Universal Consolidated Oil Co. v. Byram,* 25 Cal. App. 353 at 371, the Court refused to annul an order fixing the assessed valuation of property. It was contended that the Board of Supervisors acting as a Board of Equalization, had acted with improper motives. In holding that such allegation was irrelevant and immaterial, the California Appellate Court quoted from *C. B. & Q. R.R. Co. v. Babcock,* 204 U. S. 585, 51 L. Ed. 636, as follows:

> "When we turn to the evidence there is equal ground for criticism. The members of the Board were called, including the Governor of the state, and submitted to an elaborate cross examination of their minds in valuing and taxing the roads. This was wholly improper. In this respect the case does not differ from that of a jury or umpire, if we assume that the members of the Board were not entitled to the possible higher impugnities of a judge. . . . Jury men cannot be called, even on a motion for a new trial in the same case, to testify to the motives or influence that lead to their verdict, . . . so, as to arbitrators. . . . A similar reasoning was applied to a judge in *Fayerweather v. Ritch,* 195 U. S. 276. A multitude of cases will be found collected in *4 Wigmore on Evidence,* para. 2348, 2349. All the often repeated reasons for the rule as to jurymen apply with redoubled force to the attempt, by exhibiting on cross-examination the confusion

> of the members' minds, to attack in another proceeding the judgment of a lay tribunal, which is intended, so far as may be, to be final, notwithstanding mistakes of fact or law."

In *People v. Central Pacific Railroad Co.,* 105 Cal. 576, the Court held that testimony concerning conversations between members of the State Board of Equalization while in session was properly excluded and that the intention of the Board or any of its members could not be shown in this manner and the evidence could not be used for impeachment purposes.

In the case of *In re Smith,* 143 Cal. 368, the Court held that in the legislative exercise of police power, the motives of the supervisors in adopting an ordinance were of no consequence and not to be considered in determining the validity of the ordinance.

As to the wisdom and expediency of or necessity for the permit, this is a matter which under the law was solely within the discretion of the City Council to determine.

The rock business is a lawful and legitimate business and does not constitute a nuisance *per se.* (*People v. Hawley,* 207 Cal. 395 at 412.) Upon this point we submit that the following language, as used by the Court, in *State v. Moore,* 91 N. H. 16 at 18, 13 A. (2d) 143 at 145, is applicable to the case at bar:

> "If no one may engage in a legitimate business or occupation, unless there is a public need for him to do so, the loss of personal freedom is extreme. . . . The question is one of economic consideration but whatever the advance in the scope of the due exercise of the police power, the time has not yet come when it may be said that legislation may prohibit entrance into a legitimate field of activity for

> the reason alone that sufficient in number are already engaged therein to meet the public demand for its product or service. Special reasons for enterprises such as railroads and public utilities may justify legislation of such a character. But no reasons of that kind exist as to the business here under consideration."

The law is well settled that the Courts cannot, under the guise of exerting judicial power, usurp legislative functions by setting aside a statute or an order issued or made pursuant to a statute upon the ground that such power is unwisely or inexpediently exercised. This factor has been many times specifically repudiated as a possible basis for invalidating legislation. This judicial position has given rise to the oft repeated mandate that the Courts can have no concern as to the expediency or wisdom or necessity for the enactment of laws or for the making of administrative orders, pursuant to such legislation.

This is specifically held to be the law in the case of *Veterans Welfare Board v. Riley,* 189 Cal. 159; *Arizona v. California,* 283 U. S. 423, 75 L. Ed. 1154, and in a host of other cases of every jurisdiction in the United States, as cited in 11 American Jurisprudence, pp. 808-810.

In *Interstate Commerce Commission v. Chicago R. R. Co.,* 215 U. S. 479, 54 L. Ed. 291, it was contended that an order of the Interstate Commerce Commission made within the scope of the power delegated to such Commission by Congress was unwise and inexpedient and therefore should be set aside. The Supreme Court of the United States rejected this contention and again affirmed the long settled rule of law which has just been stated.

The discretion of the governing body is very broad in the exercise of the police power, both in determining what the interests of the public require and what measures and means are reasonably necessary for the protection of such interests. In fact, the Courts often state that within constitutional limits the legislative branch of the government is the sole judge as to what laws should be enacted for the welfare of the people and as to when and how the police power is to be exercised. This has been affirmed and reaffirmed in numerous cases, including *Pacific Coast Dairy v. Police Court,* 214 Cal. 668; *Miller v. Board of Public Works,* 195 Cal. 477; *In re Faro,* 178 Cal. 592; *Ex parte Dicky,* 144 Cal. 234.

All general principles relating to the presumptions of validity surrounding legislation and the duty of the Courts to uphold legislative action, apply with particular emphasis to exercises of the police power. Not only is the constitutionality of such measures presumed, but it must also be presumed by the Courts that the legislative body has carefully investigated and determined that the interests of the public require such legislation. It is the duty of the Courts to sustain police measures unless they are clearly, plainly and palpably in violation of the constitution. It is not enough that the case is a doubtful one; the act must be so clearly unreasonable that the Court can say that no fair-minded man can think it reasonable. The earnest conflict of serious opinion does not suffice to bring such act within range of judicial cognizance.

11 American Jurisprudence, 1089;

Erie Railway Co. v. Williams, 233 U. S. 685, 58 L. Ed. 1155;

State v. Hutchinson, 168 Ia. 1, affmd. 242 U. S. 153, 61 L. Ed. 217.

VII.

The District Court Should Have Declined to Take Jurisdiction Both Under the Provisions of Sec. 265 of the Judicial Code (28 U. S. C. A. 379) and Under the Doctrine of Comity.—12.

Prior to the commencement of this action, and on November 22, 1946, twenty-six persons, alleged to be the owners of property in the vicinity of Gregg's land, and acting in their own behalf and also on behalf of "all others similarly situated" [Tr. Vol. II, p. 369], commenced an action in the Superior Court of Los Angeles County against Gregg and the City of Los Angeles. The complaint in that action is substantially identical with the complaint in this action. It prays for the same identical relief. [Tr. Vol. II, pp. 319 to 380, incl.] It was prepared and filed by the same attorneys who appear for Appellees in this action. The issues raised by the complaint are identical with those raised herein including a claim of a violation of the Fourteenth Amendment of the United States.

After a trial before Hon. Alfred L. Bartlett, Judge of the Superior Court, lasting from May 28, 1947 until September 10, 1947, a judgment was entered in that case in favor of defendants Gregg and the City of Los Angeles and against the plaintiffs. [Tr. Vol. I, p. 287; Vol. II, pp. 458, 461, incl.] Every issue was found against the plaintiffs and in favor of defendants [Tr. Vol. II, pp. 404 to 457, incl.] including a specific finding that the granting of the permit was not in violation of either the Constitution of California or of the United States. [Tr. Vol. II, pp. 446, 447.] An appeal was taken by plaintiffs from that judgment [Tr. Vol. I, p. 287;

Vol. II, pp. 462, 463], which appeal is now pending before the Supreme Court of the State of California.

On November 14, 1947 this proceeding was commenced in the District Court. Although the plaintiffs *named* in this proceeding are different than those *named* in the State suit, nevertheless from what has been observed, it is apparent that the real parties in interest are identical in both suits, and as already stated the state action was a representative suit which included the plaintiffs named herein as represented parties. The intimate relationship between the plaintiffs in this suit and the plaintiffs in the State suit is further emphasized and made clear by the allegations contained in paragraph XXX of the complaint herein [Tr. Vol. I, pp. 40, 41, 42, 43 and 44] where in all of the plaintiffs in the State suit, although not made parties plaintiff herein, nevertheless are specifically named as owners of property in the vicinity of the Gregg land and are therefore, it is inferred, beneficially interested in this Federal suit. We submit that beyond peradventure these two suits are being concurrently prosecuted by the same parties in interest even though the *named* parties plaintiff appear to be different.

Therefore, it is appellant's position that the issuance by the District Court of a prelinminary injunction restraining those very acts that the Superior Court of California refused to restrain is an unlawful interference with the process of the State Court in violation of Section 265 of the Judicial Code (28 U. S. C. A. 379); and further, that under the doctrine of comity the District Court should have declined jurisdiction.

It is well settled that the prohibition of Section 265 of the Judicial Code extends not only to orders of the Federal Courts directly restraining proceedings of the

State Court, but to all orders of the Federal Court which necessarily have that effect and also to injunctions directed against parties engaged in the proceedings in the State Courts.

In *Hill v. Martin,* 296 U. S. 393, 80 L. Ed. 293, the Court says:

> "The prohibition of section 265 is against a stay of 'proceedings in any court of a state.' That term is comprehensive. It includes all steps taken or which may be taken in the state court or by its officers from the institution to the close of the final process. It applies to appellate as well as to original proceedings; and is independent of the doctrine of *res adjudicata.* * * * And it governs a privy to the state court proceeding—like Elinor Dorrance Hill—as well as the parties of record. Thus, the prohibition applies whatever the nature of the proceeding, unless the case presents facts which bring it within one of the recognized exceptions to Section 265. It is not suggested that there is a basis here for any such exception."

Amusement Syndicate Co. v. El Paso Land Improvement Co., 251 Fed. 345;

Cour D'Alene etc. Co. v. Spalding, 93 Fed. 280, certiorari denied 19 S. Ct. 884, 174 U. S. 801, 43 L. Ed. 1187;

Domestic & Foreign Missionary Soc. v. Hinman, 13 Fed. 161;

Whitney v. Wilder, 54 Fed. 554;

Hamilton v. Walsh, 23 Fed. 420;

N. Y. & N. E. Ry. Co. v. Woodworth, 42 Fed. 468;

Foster v. Abingdon Bank, 68 Fed. 723;

Chicago Trust Co. v. Bentz, 59 Fed. 645.

In the case of *Simpson v. Ward,* 80 Fed. 561, after the entry of an order in a State court dissolving a corporation and ordering the sale of its property, certain stockholders applied to the Federal court to restrain the sale on the ground that the State court was without jurisdiction and hence there was a denial of due process. The Federal court held that such injunction should not be granted.

In *Green v. Porter,* 123 Fed. 351, it was held that where a party obtained from a State court an injunction forbidding plaintiff in a patent infringement suit from assigning his claim, a counter injunction sought by plaintiff in a Federal court will be refused on account of the comity existing between Federal and State courts, and the confusion which would result from conflicting decrees.

And in *Carl Laemmle Music Co. v. Stern* (C. C. A.-2, 1914), 219 Fed. 534, it was held that inferior Federal courts have no power to enjoin proceedings in the State courts for supposed judicial error of their judges. Judicial error must be reviewed by the Federal courts on appeal.

It appears evident that if Appellees desired a review by the Federal courts of the issues already decided in the State suit, *which was a representative suit brought in their behalf,* the proper method would have been to intervene therein and prosecute an appeal in orderly judicial procedure through the Supreme Court of California and then to the United States Supreme Court on writ of error.

Furthermore, under the doctrine of comity, the District Court should have refused to exercise jurisdiction.

This action and that in the State court are both *quasi in rem.* They are in the nature of proceedings *in rem* to restrain and prevent the allegedly unlawful use of real

property. They are *in personam* only in the sense that Gregg is a necessary party to make the decree *in rem* effective.

In *Hill et al. v. United States* (Ct. App., D. C., 1930), 44 F. (2d) 889, the Court held that an action declaring two garages located in Washington, D. C., to be nuisances was a proceeding *in rem.* Citing *Grasfield v. United States,* 276 U. S. 494, 72 L. Ed. 670.

To the same effect are the decisions in:

Engler v. United States (C. C. A. 8), 25 F. (2d) 37;

State of Alabama etc. v. Guardian Realty Co. (Ala. Sup. Ct.), 186 So. 168;

Bradford v. Barbiene, 35 Cal. App. 770;

Foltz v. Gifford, 54 Cal. App. 183.

In *Title Restoration Co. v. Kerrigan,* 150 Cal. 289, the Court says:

> "In any view the proceedings contemplated by the act is *quasi in rem,*—that is to say, the purpose of the proceeding is not to establish an 'infinite personal liability' against any defendant, but is merely to affect the interest of the defendant in specific real property within the state. . . ."

It has long been the established rule that under the doctrine of comity, one who has first invoked action by a State court in an action *in rem* or *quasi in rem,* may not later, when dissatisfied with the result, invoke the jurisdiction of the Federal court to try *de novo* the very issues decided adversely to him in the State court. To hold otherwise would result in endless litigation and confusion. There must sometime be an end to litigation.

The Court in *In re Lasserat* (C. C. A. 9, 1917), 240 Fed 325 at 326, says:

> "The petition for mandamus must be denied. It is the general rule that, when suits are brought in courts of concurrent jurisdiction involving the same controversy and between the same parties, the court in which the suit was first instituted is entitled to the exclusive jurisdiction to determine the controversy. In Smith v. McIver, 9 Wheat. 532, 6 L. Ed. 152, Chief Justice Marshall said:
>
> 'We think the cause must be decided by the tribunal which first obtains possession of it, and that each court must respect the judgment or decree of the other.'
>
> "In Taylor v. Taintor, 16 Wall. 366, 370, 21 L. Ed. 287, the court said:
>
> 'Where a state court and a court of the United States may each take jurisdiction, the tribunal which first gets it holds it to the exclusion of the other, until its duty is fully performed and the jurisdiction invoked is exhausted.' "

In *People's Gaslight & Coke Co. v. Chicago,* 192 Fed. 398, the city had previously instituted a suit in a State court to enforce an ordinance fixing the price of gas, after which the complainant instituted its suit in the Federal court to restrain enforcement of the ordinance on the ground that its enforcement would deprive complainant of its property without due process of law. It was held that complainant's suit was not *in personam,* and hence the State court having first acquired jurisdiction and having full powers to adjudicate the rights of the parties, complainant was not entitled to such an injunction, such injunction being prohibited by Section 720, U. S. Revised

Statutes (that section being now embodied in Section 265 of the Judicial Code).

In *Orton v. Smith,* 59 U. S. (18 How.) 263, 15 L. Ed. 393, it was held that the Federal court could not take jurisdiction of a bill for an injunction to quiet title to an estate, where the title was already in litigation in a court of concurrent jurisdiction.

In *Blackmore v. Public Service Com.* (D. C., Pa.), 12 F. (2d) 752, appeal dismissed 299 U. S. 617, 81 L. Ed. 455, the Court says:

> "The jurisdiction of the superior court of Pennsylvania in considering and reviewing the action of the Public Service Commission is judicial. Thus, having passed by the ending of the administrative proceedings, and having thereafter entered a state judicial tribunal, the complainants must abide the consequences, one of which is that they are confronted with the lack of jurisdiction of this court to grant the relief sought. Section 265 of the Judicial Code provides that: 'The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state.' The prohibition of section 265 of the Judicial Code denying the right of any court of the United States to stay proceedings in any court of a state extends to the entire proceedings from the commencement of the suit until the execution issued on the judgment is satisfied. Dorrance *et al.* v. Martin *et al., supra.* To grant the relief sought would in effect stay the proceedings of the superior court of Pennsylvania. This court is without jurisdiction to grant such relief.
>
> "The rule for preliminary injunction is discharged, and the bill is dismissed."

In *Burford v. Sun Oil Company,* 319 U. S. 315, 87 L. Ed. 1424, we find the following at page 1426:

> "Although a federal equity court does have jurisdiction of a particular proceeding, it may, in its sound discretion, whether its jurisdiction is invoked on the ground of diversity of citizenship or otherwise, 'refuse to enforce or protect legal rights, the exercise of which may be prejudicial to the public interest'; for it 'is in the public interest that federal courts of equity should exercise their discretionary power with proper regard for the rightful independence of state governments in carrying out their domestic policy.' While many other questions are argued, we find it necessary to decide only one: Assuming that the federal district court had jurisdiction, should it, as a matter of sound equitable discretion, have declined to exercise that jurisdiction here? * * *
>
> "These cases reflect a doctrine of abstention appropriate to our federal system whereby the federal courts, 'exercising a wise discretion,' restrain their authority because of 'scrupulous regard for the rightful independence of the state governments' and for the smooth working of the federal judiciary. * * * This use of equitable powers is a contribution of the courts in furthering the harmonious relation between state and federal authority without the need of rigorous congressional restriction of those powers.' Railroad Commission v. Pullman Co., *supra* (312 U. S. 500, 501, 85 L. ed. 974, 975, 61 S. Ct. 643)."

In *Furnald v. Glenn* (C. C. A. 2), 64 Fed. 49, the Court states:

> "* * * No authority has been cited for the proposition that one court of equity will undertake to annul the interlocutory decree of another court of

equity; and there is no support for it upon principle or in good sense. * * *

"We are of the opinion that the court below properly dismissed the complainant's bill. To sanction his suit would be to countenance similar suits on behalf of each stockholder who may be sued for an assessment in any of the courts of the score of states in which the stockholders are to be found. The spectacle of a multitude of courts sitting concurrently in review of an interlocutory decree of a Virginia court, and assuming to control its proceedings, would be a reproach and disgrace to our jurisprudence."

In *Ponzi v. Fessenden,* 258 U. S. 254, 66 L. Ed. 607 at 611, the Court states:

"The chief rule which preserves our two systems of courts from actual conflict of jurisdiction is that the court which first takes the subject matter of the litigation into its control, whether this be person or property, must be permitted to exhaust its remedy to attain which it assumed control, before the other court shall attempt to take it for its purpose. The principle is stated by Mr. Justice Matthews in Covell v. Heyman, 111 U. S. 176, 28 L. ed. 390, 4 Sup. Ct. Rep. 355, as follows:

" 'The forbearance which courts of co-ordinate jurisdiction administered under a single system, exercise towards each other, whereby conflicts are avoided by avoiding interference with the process of each other, is a principle of comity, with perhaps no higher sanction than the utility which comes from concord; but between state courts and those of the United States, it is something more. It is a principle of right and of law, and, therefore, of necessity. It leaves nothing to discretion or mere convenience. These courts do

not belong to the same system, so far as their jurisdiction is concurrent; and although they coexist in the same space, they are independent, and have no common superior. They exercise jurisdiction, it is true, within the same territory, but not in the same plane; and when one takes into its jurisdiction a specific thing, that *res* is as much withdrawn from the judicial power of the other, as if it had been carried physically into a different territorial sovereignty.' "

In *Davega-City Radio v. Boland* (D. C., S. D., N. Y.), 23 Fed. Supp. 969, we find:

"There is also a further reason why the suit must be dismissed, namely, the principle that a decision of a state court may not be reviewed by bill in equity in a federal court. American Surety Co. v. Baldwin, 287 U. S. 156, 164, 53 S. Ct. 98, 100, 77 L. Ed. 231, 86 A. L. R. 298; Lynch v. International Banking Corp., 9 Cir., 31 F. 2d 942, certiorari denied 280 U. S. 571, 50 S. Ct. 28, 74 L. Ed. 624; Furnald v. Glenn, 2 Cir., 64 F. 49, 54; Ritholz v. North Carolina State Board, D. C. M. D. N. C., 18 F. Supp. 409, 413. Here the plaintiff has presented to the state court the same questions as to the jurisdiction of the state Board that it wishes this court to decide. The issue having been decided adversely to it, its remedy is appeal through the appropriate state courts, and, if necessary, review by the Supreme Court of the United States. It cannot obtain a review by this independent suit in the federal court."

In *Gaines etc. v. City of Chicago* (C. C. A. 7), 123 F. (2d) 104, it was held that a Federal court will rarely interfere through injunction, with the conduct of a municipal government by the city's administrative officers and that

this rule finds its strictest application in cases where the order sought would regulate the granting of licenses to carry on a business in the city. Citing *City of Chicago v. Kirkland* (C. C. A. 7), 79 F. (2d) 963.

In *General Exporting Co. v. Star Transfer Co.* (C. C. A. 6, 1943), 136 F. (2d) 329, we find the following language:

> "The attempt to relitigate in federal courts issues already determine in state court proceedings has been disapproved in numerous opinions of United States Courts below the grade of the Supreme Court. Ritholz v. North Carolina State Board of Examiners in Optometry, D. C. N. C., 18 F. Supp. 409, 413 (three-judge court); Davega-City Radio v. Boland, D. C. N. Y., 23 F. Supp. 969, 970 (three-judge court); Hall v. Ames, 1 Cir., 190 F. 138, 140, 141; Furnald v. Glenn, 2 Cir., 64 F. 49, 54. Judge Parker, in the first case cited, said: 'The remedy of plaintiffs, if they are aggrieved by the action of the state court, is appeal to the state Supreme Court, the action of which in proper cases can be reviewed by the Supreme Court of the United States by writ of certiorari. After litigating the issue in the state court, however, they cannot remove the case to the federal district court, nor can they obtain review of an adverse decision by filing a bill in equity in that court.' "

In *Gladstone v. Galton* (C. C. A. 9, 1944), 145 F. (2d) 742, Judge Healy states the rule:

> "The complaint presented no substantial claim of deprivation of civil rights and no extraordinary circumstances justifying equitable intervention by a federal court. The constitutional question sought to

be litigated here might with equal effectiveness and greater propriety be litigated in the pending proceeding in the state court, where the right exists of ultimate review in the Supreme Court of the United States."

Conclusion.

We respectfully submit that under the pleadings and affidavits in the record before us and upon the law as cited above, that the District Court abused its discrimination in granting a preliminary injunction.

We believe that the language of Judge Ross in *Anargyros & Co. v. Anargyros* (C. C. A. 9), 167 Fed. 753, is most apt:

> "Looking at the case as made by the pleadings and affidavits, we think the most that can be fairly claimed for the complainant is that it is a doubtful one. Under such circumstances the preliminary injunction should have been denied, and the temporary restraining order vacated."

Respectfully submitted,

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By DONALD J. DUNNE,
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APPENDIX.

In the case of *Reichelderfer v. Quinn,* 287 U. S. 315, 77 L. Ed. 331, 53 Sup. Ct. 177, the Court said:

"For the present purposes we assume that the proposed building would divert the land from park uses, and address ourselves to the question upon which the other issues in the case depend, whether the respondents, plaintiffs in the trial court, are vested with the right for which they invoke constitutional protection

"There is no contention that such a right arises as an incident to the ownership of neighboring land, as does an easement of light and air, under the law of some states . . . but it is argued that the right asserted, whether it be regarded as arising from a contract with the government or an interest in its lands, has a definite source in the transaction by which the park was created . . . It is true that the mere presence of the park may have conferred a special benefit on neighboring owners and enhanced the value of their property. But the existence of value alone does not generate interests protected by the constitution against diminution by the government however unreasonable its action may be. The beneficial use and hence the value of abutting property is decreased when a public street or canal is closed or obstructed by public authority (citing cases), or a street grade is raised (citing cases) or the location of a county seat (citing cases) or a railroad is changed (citing cases) but in such cases no private right is infringed.

"Beyond the traditional boundaries of the common law only some imperative justification in policy will lead the courts to recognize in old values new property rights . . .

The case is clear where the question is not of private rights lone, but the value was both created and diminished as an incident of the operations of the government. For if the enjoyment of a benefit thus derived from the public acts of government were a source of legal rights to have it perpetuated the powers of government would be exhausted by their exercise.

". . . The abutting owner cannot complain; the damage suffered by him 'though greater in degree than that of the rest of the public is the same in kind' . . .

"It is enough to say that the zoning regulations are not contracts by the government and may be modified by Congress."

In *Clifton Hills Realty Co. v. Cincinnati*, 60 Ohio App. 443, 21 N. E. (2d) 993, the Court said:

"It is clear that in passing a zoning ordinance, a municipal counsel is engaged in legislating and not in contracting. The action lacks all the essential elements of a contract. No one is bound to the municipality as a result, and the municipality binds itself to no one."

In *Eggeben v. Sonnenberg,* 1 N. W. (2d) 84, the Supreme Court of Wisconsin held that persons who had purchased property and erected single residences in a district zoned for that purpose did not acquire any vested right which would prevent the municipality from amending the zoning ordinance so as to permit the use for apartment houses of a portion of the district in the neighborhood of their residences. The Court stated as follows:

"While the respondents may suffer an annoyance they have no legal protectable rights merely because of their

reliance on the zoning ordinance. The theory of vested rights under an ordinance overlooks the fact that rights granted by legislative action under the police power can be taken away when in the valid exercise of its discretion the legislative body sees fit. The property is always held subject to the police power. The theory of vested rights relates only to such rights as an owner of property may possess not to have *his property* rezoned after he has started construction. The rationale of these cases is that he has entered on construction work or incurred liabilities for that work which he would be deprived of by the rezoning (Smith, Zoning Law and Practice, P. 43, P. 19, P. 122, Par. 89) . . . As long as the common council acted within the bounds of the legislative field, its discretion is controlling. A Court cannot substitute its opinion for that of the legislative body (*Metzenbaum, The Law of Zoning,* P. 77.)"

In the case of *Marblehead Land Company v. Los Angeles,* 36 F. (2d) 242, which was affirmed by the Circuit Court of Appeals, 9th Circuit, 47 F. (2d) 528, and a writ of certiorari denied by the Supreme Court in 284 U. S. 634, 76 L. Ed. 540, it was held that the fact that an oil company had leased, with a view to developing it for the production of oil a tract of land which by the zoning ordinance then in effect was expressly excepted from the residential zone, would not render invalid a subsequent ordinance by which the prior ordinance was repealed and the tract in question was included in the residential zone where oil operations were prohibited.

In *Chayt v. Maryland Jockey Club,* 18 A. (2d) 856, the Supreme Court of Maryland held that the owners of a house and lot in an area zoned as residential but near a race track had no legal right to the continuance of the existing zoning and therefore were not deprived of any vested right by an amendment to the zoning ordinance transferring certain lots in the area from residential classification to commercial.

In *People ex rel Miller v. Gill* (1945), 389 Ill. 394, 59 N. E. (2d) 671, it was held that where the owner of five lots desired to erect thereon an 80-unit apartment building, but two of the lots were restricted to single-family dwellings, an amendment to the zoning ordinance to permit the erection of the apartment building did not deprive neighboring lot owners of property without due process or take their property without just compensation.

In the case of *Queenside Hills Realty Co., Inc., v. Saal* (1946), 328 U. S. 80, 90 L. Ed. 1096, the Court states:

"Appellant's claim of lack of equal protection is based on the following argument: The 1944 law applies only to existing lodging houses; if a new lodging house were erected or if an existing building were converted into a lodging house, the 1944 law would be inapplicable. An exact duplicate of appellant's building, if constructed today, would not be under the 1944 law and hence could be lawfully operated without the installation of a wet pipe sprinkler system. That is said to be a denial of equal protection of the laws.

"The difficulty is that appellant has not shown that there are in existence lodging houses of that category which will escape the law. The argument is based on an

anticipation that there may come into existence a like or identical class of lodging houses which will be treated less harshly. But so long as that class is not in existence, no showing of lack of equal protection can possibly be made. For under those circumstances the burden which is on one who challenges the constitutionality of a law could not be satisfied . . . The point is that lack of equal protection is found in the actual existence of an invidious discrimination, (Traux v. Raich, 239 U. S. 33, 60 L. Ed. 131, 36 S. Ct. 7, L. R. A. 1916D 545, Ann. Cas. 1917B 283; Skinner v. Oklahoma, 316 U. S. 535, 86 L. Ed. 1655, 62 S. Ct. 1110), not in the mere possibility that there will be like or similar cases which will be treated more leniently."

See also *Ex parte Quong Wo,* 161 Cal. 220; *Estate of Johnson,* 139 Cal. 532.

In the case of *People v. Globe Grain & Milling Co.,* 211 Cal. 121, the Court states:

"The contention that the statute is discriminatory is purely speculative. On its face it treats all persons in the same manner, authorizing the Commission to extend its benefits to anyone so long as the interests of the people in the preservation of food fish are safeguarded. The theory of the attack appears to be that inasmuch as the legislature has not expressly prohibited discrimination to an applicant, the Commission may therefore favor one over others, and might perhaps create a monopoly by granting a permit to one person to take all the available fish. The Courts have given scant consideration to such reasoning . . . A statute cannot be declared unconstitutional upon such implications. The rule is just to

the contrary. It is of no consequence that the statute makes no reference to an equitable apportionment of the benefits to be granted. The important thing is that it contains no express grant of authority to the Commission to indulge in favoritism or to make or enforce discriminatory rules. A presumption of constitutionality protects every legislative act. Being silent on the matter of apportionment of the benefits, the statute will be construed together with the constitutional provisions against discrimination, and, as so considered, must be upheld."

In the case of *Mayor etc. of City of Savannah v. Holst* (C. C. A. 5, 1904), 132 Fed. 901, the Court says:

"The original bill in this case was filed by J. B. Holst and seven others, all citizens of Georgia, against the city of Savannah, a municipal corporation chartered under the laws of Georgia, and the Savannah Electric Company, a corporation organized and chartered under the laws of Georgia. Relief was prayed for by injunction. The Circuit Court granted a temporary injunction, and the decree taking jurisdiction of the case and granting the injunction is assigned as error.

"The complainants being citizens of Georgia, and the defendant corporations, for purposes of jurisdiction, being considered citizens of that state also, the court below had no jurisdiction of the case by reason of the diverse citizenship of the parties . . . The claim on the part of the complainants that the Circuit Court had jurisdiction of the case was clearly based on the assumption that the suit was one arising under the Constitution or laws of the United States. The jurisdiction cannot be maintained on this ground unless the suit involves a controversy as to

the effect or construction of the Constitution or laws of the United States, upon the determination of which the result depends. 'And it must appear on the record,' said the court in Western Union Telegraph Company v. Ann Arbor Railroad Company, 178 U. S. 239, 20 Sup. Ct. 867, 44 L. Ed. 1052, 'by a statement in legal and logical form, such as is required in good pleading, that the suit is one which does really and substantially involve a dispute or controversy as to a right which depends on the construction of the Constitution or some law or treaty of the United States before jurisdiction can be maintained on this ground.' We are of the opinion that the record before us does not meet the requirements of this rule. It is true that the bill contains the general averment, found in many records where the jurisdiction has been denied, that the acts of the defendants sought to be enjoined 'would deprive plaintiffs of their property rights without due process of law, and in contravention of the Constitution of the United States.' This conclusion of the pleader is not controlling. We must look to the case made by the bill. The bill shows that the plaintiffs own lots fronting on Gwinnett Street, 'of which they have been in daily use'; that the electric company, one of the defendants, is proceeding to erect poles and string wires and lay tracks for the operation of its cars upon that street under the 'pretended authority of a resolution passed by the mayor and aldermen of the city of Savannah.' It is alleged that this resolution was passed at midnight, without giving the notice required by law, and that it was read but once, when the law required that it be read twice. It is then averred that the resolution is 'illegal and void,' and that it conferred no rights on the Savannah Electric Company. This laying of the tracks, etc., it is alleged, will damage

each of the complainants $2,000, in this: that each will 'practically be prevented from using the street in front of his property and his property rights therein will be destroyed and taken away.' It also alleged that the mayor and aldermen, in passing the resolution, acted under 'assumed authority' from the State of Georgia, and as an agency of the state for governmental purposes.

"It will be observed that the complainants elaborately show that the resolution was passed without notice, and without complying with the law—clearly referring to the state law—and that, therefore, the resolution is void, and that it conferred no authority on the electric company to lay its tracks on Gwinnett Street. It is not alleged, or even asserted, in argument, that the Legislature of Georgia has passed any statute which conflicts with the Constitution or laws of the United States; nor is it alleged that it has conferred, or attempted to confer, on the mayor and aldermen of the city of Savannah the authority to enact such ordinances. The gravamen of the bill is that the city has passed a resolution void under the state law, and that the electric company is acting unlawfully under a claim of authority conferred by the resolution. The only reasonable construction that can be placed on the bill is that it asserts that the action of the municipal corporation is illegal and void because it is contrary to the laws of the state of Georgia. That contention raises questions depending for their solution on the laws of Georgia. There is no construction of the federal Constitution involved in the inquiry as to whether the resolution in question is valid or void under the Georgia laws. The bill therefore presents no dispute about the construction of the Constitution or laws of the United States in any way. The ques-

tion presented is as to the validity of the city's resolution, which is a matter of state law. McCain v. Des Moines, 174 U. S. 168, 19 Sup. Ct. 644, 43 L. Ed. 936. A municipal ordinance not passed under legislative authority is not a law of the state within the meaning of the prohibitions of the Constitution. Hamilton Gas Light Co. v. Hamilton City, 146 U. S. 258, 13 Sup. Ct. 90, 36 L. Ed. 963. The jurisdiction of the Circuit Court can be sustained, if at all, only on the ground that the construction and operation of the railway enjoined deprived the complainants of their property without due process of law, in violation of the fourteenth amendment. That amendment operates against deprivation by a state, and the bill here shows that what is done is without authority, and is illegal and void. It does not appear that the municipal corporation has acted under the authority of a Georgia law alleged to be violative of the Constitution. The case comes clearly, we think, within the principle stated in Barney v. The City of New York, 193 U. S. 430, 24 Sup. Ct. 502, 48 L. Ed. 737, where the Supreme Court held that the Circuit Court was without jurisdiction. If it be true, as alleged in the bill, that the mayor and aldermen have passed an ordinance which, under the laws of Georgia, they had no right to pass, and that the ordinance is void, and that the electric company is trespassing on the property of the complainants or interfering with their property rights under the authority seemingly conferred by the void ordinance, these wrongs undoubtedly confer a right of action on the plaintiffs. But unless it appears from the averment of facts in the bill in such form as is required by good pleading that the suit is one which involves a controversy as to a right which depends

on the construction of the Constitution or some law of the United States, the jurisdiction cannot be maintained on that ground.

"The temporary injunction is dissolved, the decree of the Circuit Court reversed, and the cause remanded."

In *Snowden v. Hughes* (C. C. A. 7, 1942), 132 F. (2d) 476, it is said:

"It has always been accepted that the Fourteenth Amendment does not apply to the acts of individuals, State of Virginia v. Rives, 100 U. S. 313, 25 L. Ed. 667; United States v. Harris, 106 U. S. 629, 1 S. Ct. 601, 27 L. Ed. 290; that the protection it offers is only against the acts of states. Established as this limitation is, the problem of determining what action is state action within the meaning of the amendment is not always easy. To be sure, in every case the initial question is whether the action was by a state instrumentality, but the controlling question is whether sufficient state sanction was given to such action to make it the action of the state for the purposes of the Fourteenth Amendment, since 'Many acts done by an agency of a state may be illegal in their character when tested by the laws of the state, and may, on that ground, be assailed, and yet they cannot, for that reason alone, be impeached as being inconsistent with the due process of law enjoined upon the states. The 14th Amendment was not intended to bring within Federal control everything done by the state or by its instrumentalities that is simply illegal under the state laws, but only such acts by the states or their instrumentalities as are violative of rights secured by the Constitution of the United States.' Owensboro Water Works Co. v. City of

Owensboro, 200 U. S. 38, 47, 26 S. Ct. 249, 252, 50 L. Ed. 361.

"In Barney v. City of New York, 193 U. S. 430, 24 S. Ct. 502, 48 L. Ed. 737, the court held that where the act complained of was forbidden by the State Legislature, it could not be said that the act was that of the state for the purposes of the Fourteenth Amendment, and the court denied the jurisdiction of the District Court to entertain the cause. This decision controls the instant case, for it appears on the face of the plaintiff's complaint that the defendants' acts were forbidden by the Illinois statute and that these illegal acts were the gravamen of the plaintiff's complaint.

"We recognize that there is some question as to the current value of the Barney case as authority. In the light of subsequent Supreme Court cases, there can be no doubt that the broad language used in the Barney opinion is no longer accurate * * * but the narrow holding of the Barney case still stands as a matter of law and as a matter of sound federal jurisprudence. We conclude that when the act complained of is plainly and clearly in violation of a state law, as in our case, it is not an act of the state for the purposes of the Fourteenth Amendment."

It is said in *Owensboro Waterworks Co. v. Owensboro,* 200 U. S. 38, 50 L. Ed. 361 (pp. 364-365):

"The utmost that can be said of the present case, as disclosed by the bill, is that the municipal authorities of Owensboro have done some things outside or in excess of any power the city possessed. But this does not of itself show that they acted without the due process of

law enjoined by the 14th Amendment; for, if what is complained of had been done directly by the state or by its express authority, or if the legislature could legally ratify that which the city has done, as it undoubtedly might do, no one would contend that there had been a violation of the due process clause of the amendment. It cannot be that the acts of a municipal corporation are wanting in the due process of law ordained by the 14th Amendment, if such acts, when done or ratified by the state, would not be inconsistent with that Amendment. Many acts done by an agency of a state may be illegal in their character when tested by the laws of the state, and may, on that ground, be assailed, and yet they cannot, for that reason alone, be impeached as being inconsistent with the due process of law enjoined upon the states. The 14th Amendment was not intended to bring within Federal control everything done by the state or by its instrumentalities that is simply illegal under the state laws, but only such acts by the states or their instrumentalities as are violative of rights secured by the Constitution of the United States. A different view should give to the 14th Amendment a far wider scope than was contemplated at the time of its adoption, or than would be consonant with the authority of the several states to regulate and administer the rights of their peoples, in conformity with their own laws, subject always, but only, to the supreme law of the land."

In the case of *Defiance Water Co. v. Defiance,* 191 U. S. 184, we find the following significant language:

"* * * Ordinarily the question of the repugnancy of a state statute to the impairment clause of the Constitution is to be passed upon by the state courts in the

first instance, the presumption being in all cases that they will do what the Constitution and laws of the United States require (*Chicago & A. R. Co. v. Wiggins Ferry Co.,* 108 U. S. 18, 27 L. ed. 636, 1 Sup. Ct. Rep. 614, 617); and if there be ground for complaint of their decision, the remedy is by writ of error under Sec. 709 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 575). Congress gave its construction to that part of the Constitution by the 25th section of the judiciary act of 1789 (1 Stat. at L. 85, chap. 20), and has adhered to it in subsequent legislation." (p. 143.)

* * * * * * * *

"Litigation in the state courts cannot be dragged into the Federal courts at such a stage and in such a way. The proposition is wholly untenable that, before the state courts in which a case is properly pending can proceed to adjudication in the regular and orderly administration of justice, the courts of the United States can be called on to interpose on the ground that the state courts might so decide as to render their final action unconstitutional.

"Moreover, the state courts are perfectly competent to decide Federal questions arising before them, and it is their duty to do so. *Robb v. Connolly,* 111 U. S. 624, 637, 28 L. ed 542, 546, 4 Sup. Ct. Rep. 544; Missouri P. R. Co. v. Fitzgerald, 160 U. S. 556, 583, 40 L. ed. 536, 543, 16 Sup. Ct. Rep. 839.

"And, we repeat, the presumption is in all cases that the state courts will do what the Constitution and laws of the United States require. *Chicago & A. R. Co. v. Wiggins Ferry Co.,* 108 U. S. 18, 27 L. ed. 636, 1 Sup. Ct. Rep. 614, 617; *Shreveport v. Cole,* 129 U. S. 36, 32 L. ed. 589, 9 Sup. Ct. Rep. 210; *Neal v. Delaware,* 103

U. S. 370, 389, 26 L. ed. 567, 571; *New Orleans v. Benjamin,* 153 U. S. 411, 424, 38 L. ed. 764, 769, 14 Sup. Ct. Rep. 905.

"If error supervenes, the remedy is found in sec. 709 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 575.)

"The present case strikingly illustrates the applicability of these well-settled principles. The preliminary injunction was dissolved by the court by which it was granted, and the city's suit was dismissed by the highest judicial tribunal of the state.

"We regard this bill as an attempt to evade the discrimination between suits between citizens of the same state, and suits between citizens of different states, established by the Constitution and laws of the United States, by bringing into the circuit court controversies between citizens of the same state,—an evasion which it has been the constant effort of Congress and of this court to prevent (*Bernards Twp. v. Stebbins,* 109 U. S. 341, 353, 27 L. ed. 956, 960, 3 Sup. Ct. Rep. 252; *Shreveport v. Cole,* 129 U. S. 36, 44, 32 L. ed. 589, 592, 9 Sup. Ct. Rep. 210); and are of opinion that it should have been dismissed for want of jurisdiction."

In the case of *Pennsylvania Company v. Sun Company,* 290 Pa. 404, 138 Atl. 909, the Court discusses the principle of law regarding anticipated nuisances as follows:

"The bill does not charge any such inherent characteristic or any such likelihood of danger. True, it does say that petroleum and its by-products are highly explosive, readily ignited, and susceptible to ignition from lightning, spark, flame, intense heat of the sun, or internal combus-

tion. It does not charge that the natural, the probable result of the building with its contents will be an explosion or a fire. It does not charge that this would be a 'plainly manifest' result from placing oil or its by-product in the tank. It does charge that, because it is readily ignited, and because it is susceptible to ignition, the result of the building under those circumstances would be a constant menace and danger. All of this is purely problematic or conjectural. Of course, petroleum and its by-products, under the circumstances here existing, are readily ignited; but will they be ignited? Is that likely? Does common experience show it? Is the manner of use as described such that the probabilities are that they will be? The words 'readily' and 'susceptible' are words of anticipation, apprehension, or mere fear, or, as the authorities say, doubtful, eventual or contingent. The statement that the use becomes a menace is but a conclusion based on these antecedent conjectures.

"There is no allegation in the bill that the construction is improper, that the equipment is not of the ordinary and usual kind, or that the regulation of the plant and its supervision is not of the best; nor does the bill aver that there will be a failure to afford proper appliances in its conduct . . .

"What we have said may be summarized briefly in this way: Where it is sought to enjoin an anticipated nuisanse; it must be shown (a) that the proposed construction or the use to be made of property will be a nuisance *per se*; (b) or that, while it may not amount to a nuisance *per se*, under the circumstances of the case, a nuisance must necessarily result from the contemplated act or thing. See 7 A. L. R. 749, 26 A. L. R. 937. The injury must be

actually threatened, not *merely anticipated;* it must be *practically certain,* not *merely probable.* It must further be shown that the threatened injury will be an irreparable one which cannot be compensated by damages in an action at law. A mere decrease in the value of complainant's property is not alone sufficient. *Rhodes v. Dunbar,* 57 Pa. 274, 98 Am. Dec. 221." (Italics added.)

In *People v. Hawley,* 207 Cal. 295, the Court says:

"No authority is required to support the proposition that the business of excavating rock and gravel by the owner from lands belonging to him is a lawful and useful occupation, and cannot be prohibited by legislation except in cases where the enactment of such legislation may be found necessary for the protection of the legal rights of others. If authority were necessary we have but to refer to a decision of this court, *In re Kelso,* 147 Cal. 609 (109 Am. St. Rep. 178, L. R. A. (N. S.) 796, 82 Pac. 241). That case, we think, sheds some light upon the general aspect of the present action. An ordinance of the city and county of San Francisco was there under consideration wherein the attempt was made to prohibit the operation of any rock or stone quarry within certain prescribed limits of said municipality. This court, in declaring said ordinance unconstitutional and void, said (p. 612): 'Applying these well-recognized principles to the ordinance before us, we are unable to perceive any ground upon which it may be sustained as a legitimate exercise of the police power. It is in no sense a mere regulation as to the manner in which rock or stone may be removed from the land by the owner thereof, but is an absolute prohibition of any such removal. However valuable the rock or stone may be if removed, and however valueless if not removed, the owner must allow it to remain in its place

of deposit. Such a prohibition might be justified, if the removal could not be effected without improperly invading the rights of others, but it cannot be doubted that rock and stone may under some circumstances be so severed from the land and removed as not in the slightest degree to inflict any injury which the law will recognize. So far as such use of one's property may be had without injury to others it is lawful use which cannot be absolutely prohibited by the legislative department under the guise of the exercise of the police power.' This court has even gone so far as to hold an ordinance void which prohibited the operation and maintenance of a rock-crusher in this same Arroyo Seco and situated only a short distance from the lands of the present plaintiff, the Los Angeles Rock & Gravel Company. (*In re Throop,* 169 Cal. 93 (145 Pac. 1029).) It will be noted, however, that in the present action the rock-crusher of the company is not located or operated upon any of the lands herein involved. The record shows that the company owns and maintains a rock-crusher on land situated to the south of the lands involved in the present action, and that it only seeks to excavate by means of an electric shovel rock, gravel and sand from its said land, which materials when so excavated are loaded upon trucks, and transported to said rock-crushing plant of the company, where they are treated and prepared for commercial uses. We have already referred to the fact that in the action of *People v. Hawley* the trial court abated all nuisance of which complaint was made and which it was alleged and found were caused by the Los Angeles Rock & Gravel Company in their excavations upon the lands owned by it and comprising approximately one hundred and thirty acres. The trial court found that to permit the company to continue its excavation operations upon said lands subject to the conditions imposed upon said operations by the judgment and

decree in *People v. Hawley, et al.,* would not result in any substantial injury to adjoining property or to persons residing or owning property in the near vicinity of the lands of said company. Any ordinance of said city which would enjoin and prohibit the company from thus using its property is therefore void, as an unreasonable restraint upon the use by it of its property and an unwarranted interference with the right of said company to carry on a lawful business and to use and enjoy its own property."

The facts in the *Hawley* case are substantially the same as those in the instant case. The contemplated operation, by the evidence, is revealed as being substantially the same as those in the *Hawley* case.

In Pomeroy's Equity Jurisprudence, Vol. 5, Sec. 1945, we find the following statement:

"When the defendant's business which constitutes the nuisance complained of is one from which the public benefits directly or in an unusually marked degree, the balance of injury presents itself in a different form. Shall the plaintiff by procuring an injunction put an end to a business from which the public receives large benefit, and from the stopping of which public hardship would ensue? . . . We think it may be safely assumed that the rule in equity is, that where the damages can be admeasured and compensated, equity will not interfere where the public benefit greatly outweights private and individual inconvenience."

And again in Sec. 1948 we find the following statement:

"The forms of injunction used against nuisances illustrate to an unusual degree both the flexibility of equitable procedure and also the relative nature of nuisances. In a

great many cases a thing is a nuisance not because it is in itself deemed wrongful in law, but because the manner in which it is done, or the extent to which it is carried, causes it to cross the line beyond which the law will not allow one to go, even in the strict conduct of his own business. This situation is recognized by equity courts in granting injunctions, with the result that they are generally so framed as to prohibit only that part of the thing complained of which is injurious, saving to the defendant the right to continue his business if it can be conducted in a harmless way. 'Injunctions against carrying on a legitimate and lawful business should go no further than is absolutely necessary to protect the lawful rights of the parties seeking such injunction. When a person is engaged in carrying on such business, he should not be absolutely prohibited from doing so, unless it appears that the carrying on of such business will necessarily produce the injury complained of. If it can be conducted in such a way as not to constitute a nuisance, then it should be permitted to be continued in that manner.' (Citing cases.) This result is sometimes reached by inserting in the prohibition such qualifying words as 'to the injury or damage of the plaintiff,' or others of similar nature; sometimes by giving the defendant leave to apply for a modification of the injunction upon giving satisfactory proof that he can and will conduct his business so as not to amount to a nuisance. Or the court may make a tentative specific order, subject to be modified if experience shows it does not satisfactorily accomplish its purpose. In accordance with the same principle injunctions will not be issued, it is said,

against a business which is a nuisance, when the nuisance can be remedied by the use of scientific appliances; instead the court will direct the introduction of such appliances, and whenever necessary to prevent hardship a reasonable amount of time, in which the defendant may conform to the injunction, will be allowed."

Citing *Judson v. Los Angeles Suburban Gas Company,* 157 Cal. 168.

In *McMenomy v. Baud,* 87 Cal. 134, the Court states:

"The judgment perpetually enjoins the defendant 'from erecting, maintaining, having, keeping, or operating on said premises of defendant, described in the pleadings and records herein, said brass-foundry and machine-ship, boiler and engine, or any foundry or machine-ship, boiler or engine, causing noises, smoke, or other effluvium, injurious to health, offensive to the senses, or an obstruction to the free use of plaintiff's property described herein.' And further orders and decrees that a permanent injunction issue to defendant and his servants and employees, 'requiring him and them, and each of them, to perpetually refrain from having, maintaining, operating, or continuing the use of said brass-foundry and machine-shop, boiler and engine, or either thereof, on the said premises of defendant, and requiring him and them, and each of them, to perpetually refrain from having, erecting, maintaining, or operating any brass-foundry, or foundry or machine-shop, boiler or engine, thereon, causing noises, smoke, or other effluvium, injurious to health, offensive to the senses, or an obstruction to the free use of plaintiff's property described herein, and that said nuisance now maintained on said premises of defendant be abated.'

"There is no finding and no evidence to justify a finding, that either of these causes of annoyance and injury to plaintiff was necessarily incident to the proper opera-

tion of the foundry or machinery complained of. Indeed, the evidence tends to prove that the injurious effects may be remedied without enjoining the running of the fonndry or machinery, and that it was only improper and negligent manner of running them that caused the injurious effects upon the plaintiff and his property. It is said that the smoke-stack and the steam-escape pipe are too low, that the boiler and engine are not properly set, and that the fuel is not such as should be used. There is no pretense that the 'dipping' of brass castings in diluted acids, *upon the sidewalk,* was necessary, or that such dippings might not be done at some other place, from which the fumes would not reach plaintiff's house; nor that the improper obstruction of the sidewalk was necessary to the proper operation of the foundry or machinery.

"A brass-foundry and machinery incident thereto are not *prima facie* nuisances; and a plaintiff who complains of them must allege and prove that they are such by reason of their peculiar location or the improper or negligent manner in which they are conducted. Therefore, where the injurious effects complained of may be prevented without abating or enjoining the works or the operations thereof entirely, only the causes of the specific injurious effects proved should be enjoined. If, for example, the cause be the production and escape of smoke and soot in such a way as that they penetrate plaintiff's premises, to his injury, the remedy by injunction should be restricted to this specific injury, and leave the defendant at liberty to operate his works, if he can, and elects to do so, in such a manner as to remove the cause and prevent the injury. (*Tuebner v. Cal. St. R. R. Co.,* 66 Cal. 171; *Sullivan v. Royer,* 72 Cal. 248; 1 Am. St. Rep. 51; Cooley on Torts, 2d ed., 714 *et seq.;* Wood on Nuisances, secs. 144, 151, 556, 565; *Carson v. Central R. R. Co.,* 35 Cal. 332; Brown v. Kentfield, 50 Cal. 129)."